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THE WISCONSIN ELECTION CASE.

An experienced legal practitioner of our acquaintance was wont to assert that business comes to the profession in *veins*, as it were, large amounts of similar business at once.

One year is fruitful in insurance causes, he would say; the next perhaps in disputed land titles, and a third in controversies involving constitutional law.

If such a classification be possible, we suppose the present year will be known as the year of contested elections. There have been disputes of this sort from Maine to California. From inspectors of elections to judges, nay, to members of congress, governors, and even entire legislative bodies, no one seems to hold his loaf or his fish this year by an unquestioned title.

These causes, political or *quasi* political in their nature, are not always decided in the courts of law, and when they are, it is no matter of congratulation to the profession. We consider them the greatest strain upon the sheet anchor of the judiciary.

The parties in such causes appear as champions, with their merits heralded in advance by the newspapers, with their compurgators about them, and fortunate it is for judges and juries who are called upon to decide between such rivals, if they escape becoming to some extent involved in the heat and smoke of the battle, in the opinion of partisans, at least, if not in fact.

In Maine, the question who should have the right to serve

writs for a few months in one of the counties, has been the cause or occasion of dealing a blow to the judiciary of that state from which it will not recover in as many years, if at all. We had intended to give some account of this case at this time, especially in its constitutional aspects, but the materials not being all at hand, we must defer it.

In another part of this number we give some account of the contested judgeship in New York, which grew to something more than the proportions of a common law-suit. And many other recent instances are within the recollection of all our readers.

Among these is the Wisconsin election case, some short account of which we have thought might be interesting.

By the constitution of Wisconsin, "the executive power shall be vested in a governor, who shall hold his office for two years." He shall be elected by the qualified electors of the state, at the times and places of choosing members of the legislature, and the person having the highest number of votes shall be elected.

The returns of election for governor shall be made in such manner as shall be provided by law.

The law provides for a board of town, county and state canvassers. The latter body is composed of the secretary of state, state treasurer and attorney general, two of whom shall be a quorum for the transaction of business; and if one only of these officers shall attend on the day appointed for a meeting of the board, the clerk of the Supreme Court is to attend with him, and they two shall form the board.

This board make up a statement from the county returns of the whole number of votes given for governor, and how many for each candidate, and distinguishing the votes of each county. They thereupon determine who is, by the greatest number of votes, elected to each office, and certify the same to the secretary of state, who publishes a copy and issues certificates of election.

There is a general provision that canvassers (that is, apparently, town, county or state) are to give certificates of election to the persons who have the highest number of legal votes, notwithstanding defects of form.

The constitution also provides that the judicial power of the state shall be vested in certain courts.

The Supreme Court, except in cases otherwise provided in the constitution, shall have appellate jurisdiction only. It shall have a general superintending control over all in-

ferior courts and power to issue writs of *habeas corpus*, *mandamus injunction*, *quo warranto*, *certiorari*, and other original and remedial writs, and to hear and determine the same.

And statute gives the court power to inquire on *quo warranto* into the question of intrusion into any public office.

At the last state election in Wisconsin the state canvassers certified to the secretary of state, that Mr. Barstow was elected governor, and the secretary issued his certificate and made due publication, and at the proper time (in January) Mr. B. entered upon the duties of the office. Doubt had already been thrown, however, on the genuineness of certain of the returns and in the correctness of others, and it was believed by Mr. Bashford, the rival candidate, that the election, if truly returned, would be found to have resulted in his favor.

He accordingly applied to the attorney general of the state, who filed an information in the nature of a *quo warranto*, upon the relation of Bashford against Barstow.

We copy the following account of the proceedings from the summary of Mr. Justice Cole, in his opinion, delivered about March 20, 1856:

"On the 15th day of January, 1856, the attorney general, the legal officer of the state, filed in this court an information in the nature of a writ of *quo warranto* upon the relation of Coles Bashford, giving the court to understand and be informed that the respondent, for the space of one day and upwards then last past, had held, used and exercised, and still did hold, use and exercise the office of governor of the state of Wisconsin without any legal election, appointment, warrant or authority whatever therefor; and that at a general election of state officers of said state in the several counties thereof, on the 6th day of November, 1855, the relator was duly elected and chosen governor of the state aforesaid, and that the said relator hath ever since the 7th day of January, 1856, and still is rightfully entitled to hold, use and exercise the said office; which said office of governor aforesaid the respondent on the 7th day of January usurped, intruded into, and unlawfully held and exercised, and still doth usurp, intrude into, and unlawfully hold and exercise, in contempt of the people of this state, and to their great damage and prejudice; and prayed for due process of law against the respondent in this behalf to be made, to answer the said people by what warrant he claims to hold, use, exercise and enjoy the office of governor of this state.

"In compliance with the prayer of this information, a summons in due form was issued, returnable on the 5th day of February, 1856, which summons was returned served according to law.

"On the 22d of January, the relator by his counsel filed a motion to discontinue the information filed by the attorney general, and for leave to file in lieu thereof an information in the nature of a *quo warranto* upon his own relation, different from the one already filed, and for liberty to prosecute and control the same by himself or counsel, as he should be advised; and for such other or further order as the court should deem proper in the premises.

"This application was based upon two grounds:

"1st. That the attorney general having refused to file a special information prepared by the relator, but filing a different one, the relator's right to file one on his own relation and prosecute it to final judgment, became perfect under the act of 1855, and

"2d. An alleged hostility or unfriendliness upon the part of the attorney general to the interests, rights and success of the relator. The motion was resisted on argument by the attorney general on behalf of the state, and by the counsel for the respondent, who that day entered his appearance in the cause. The motion was overruled, the court holding upon the first point, that the attorney general had substantially complied with the act of 1855, in filing an information adequate to all the purposes of the suit; and, upon the second point, that the attorney general might control the proceeding as long as he prosecuted with fidelity; but if he should act in bad faith towards the relator, or attempt to fritter away his rights, the court would interfere for the protection of them.

"On the 25th, a rule was entered by the attorney general, requiring the respondent to plead to the information in such time as the court should direct. The court required the respondent to plead on or before the 5th of February ensuing.

"On the 2d of February, the counsel for the respondent filed their motion to quash the summons issued herein, and to *dismiss* the same, and all proceedings, for the reason that the court had no jurisdiction in the premises. By order of the court, the argument of this latter motion came on for argument on the 11th of February, and the counsel for the respondent then endeavored, with great zeal and earnestness, to sustain their motion by insisting upon and establish-

ing the position, that even when there is an usurpation of the office of governor of this state by a person not lawfully entitled to exercise its duties, this court has no constitutional power to entertain a proceeding for his removal, but that the person thus intruding could only be reached and removed by revolutionary force.

"The court thought the position an unsound one, and overruled the motion, deciding the principle that where there was an intrusion without color of right *even* into the office of governor of this state, it had the power to entertain a proceeding to inquire into the right of the person thus holding the office, and to remove the intruder.

"On the 25th of February, the respondent filed a plea in abatement to the jurisdiction of the court, setting forth in said plea that by the laws of the state of Wisconsin, regulating the manner of conducting general elections, and the canvass of votes thereat applicable to the election stated in said information, it became and was the duty of the board of state canvassers, upon a statement of the whole number of the votes given at the said election, and for whom given for the said office of governor, to be by them made and certified to be correct, and subscribed by their names, to determine what person was by the greatest number of votes duly elected to said office, and to make and subscribe on such statement a certificate of such determination, and deliver the same to the secretary of state, and thereupon it became and was the duty of the said secretary of state without delay, to make out and transmit to the person thereby declared to be elected to the office of governor, a certificate of his election, certified by him under his seal of office: that in fact, Alexander T. Gray, secretary of state, Edward H. Janssen, state treasurer, and George B. Smith, attorney general, who then constituted the said board of state canvassers, met together at the office of the secretary of state, in the capitol at Madison, on the 15th day of December, A. D. 1855, the day duly appointed pursuant to law for that purpose, and did proceed according to law to make a statement of the whole number of votes given at said election for the said office of governor, showing the names of the persons to whom such votes were given for said office, and the whole number given to each one, distinguishing the several counties in which they were given, and did certify such statement to be correct, and subscribe their names thereto, and that they did thereupon determine and certify that by the greatest number of votes polled at said election,

the respondent was duly elected to said office of governor, for the term of two years commencing on the first Monday of January, 1856, and that they did in pursuance of law, make and subscribe on such statement a certificate of such determination in due form of law, and did duly deliver the same to the secretary of state; and that thereupon, in pursuance of law, the said secretary of state did make out and transmit to said respondent a certificate of his election to the said office of governor of said state, for the term aforesaid in due form of law, and duly certified by him under his seal of office. And that said certificate was duly received by said respondent, who thereupon duly qualified himself by taking the customary and proper oath of office as such governor, and entered into possession of such office as he lawfully might; duly certified copies of which said statement and certificates authenticated under the great seal of the state, the said respondent here in court produces and shows to the court.

"Certified copies (under the seal of the secretary of state) of the statement made by the board of state canvassers, of the official oath of the respondent, and of the certificate of election, accompanied this plea as exhibits. The plea was demurred to, several causes of demurrer being assigned. The demurrer was sustained upon the ground, that the matters contained in the plea, if good at all, should be plead in bar to the action, and did not go to the jurisdiction of the court. Consequently judgment of *respondeas ouster* was given on the demurrer, and the respondent had four days, until the 8th inst., to file his plea in bar. He has purposely made default. On the 11th, the counsel for the relator moved for final judgment. While this motion for judgment was under advisement, the attorney general on the 18th inst. files a motion to discontinue the proceeding, and this motion is resisted by the relator."

This motion also was overruled, and the court decided that, although by the default of the respondent, the judgment would, as of course, according to precedent, be in favor of the relator, yet as the cause was of great importance, they should hold the latter to make out a *primâ facie* case of his own right to the office. This was done at a subsequent day, and judgment was given and execution issued, by virtue of which Mr. Bashford was put into possession of the *insignia* of office, and has ever since, we believe, exercised its functions.

The principal point of the case was upon the general

question of jurisdiction. This was argued at great length and with great ability, by Messrs. Carpenter, Orton and Arnold, counsel for Mr. Barstow, against the jurisdiction, and in its favor by Messrs. Randall, Knowlton and Howe, counsel for Mr. Bashford, the relator.

Chief Justice WHITON, and Justices SMITH and COLE gave, at different stages of the cause, elaborate and able opinions, on this and the other points, and, as we have seen, sustained the jurisdiction.

It is the novelty of the question, in its application to the particular office of governor of a state, rather than any apparent difficulty in its solution, that has induced us to present it to our readers.

Was the decision of the court correct?

We have no doubt of it.

The arguments for the respondent were marked, as we have said, by great ability and research. Two points were taken under the local law. 1st. That the office or post of governor was not a "public office" within the meaning of the statute on the subject of *quo warranto* (above noticed.)

2d. That the certificate of the state canvassers was conclusive.

Upon these points comparatively little stress was laid. And we think they were properly overruled. Upon a candid and reasonable construction of the statutes, we think it will be manifest that neither of these positions can be maintained. We pass them, however, as local and relatively unimportant.

The counsel took bolder ground. They argued that whatever might be the law, the constitution intended that such a question should not be decided in the courts. That the three departments of government, the executive, legislative and judicial, were independent, equal, and each within its own sphere supreme. That to preserve this equality, it was absolutely essential that neither should have any right, under any circumstances, to pass upon the title of the others. For this reason, the legislature decide upon the election and qualification of members of their own body.

Referring to historical precedents, why, it was asked, had it never been heard of from the origin of modern governments to this day, that a suit had been brought in the courts to try the right of the chief executive magistrate? How many battles, how much blood, how many volumes of history would have been spared, if such an appeal could have been taken!

England formerly, and France in more recent times, had experienced a great many changes of this sort, but no precedent of an appeal to the courts could be produced.

The executive *de facto* has always been recognized without proof, for all purposes and in all proceedings in the courts of law.

The answer is entirely convincing on all points.

The foreign precedents are easily disposed of. They have been decided generally by the strong hand, against which there is no appeal; the bayonet has taken the place of the *posse*, the *coup d'etat* and *pronunciamento* of the *quo warranto*.

In England, the question has not arisen in recent times; at some former periods a settlement of the crown has sometimes been peaceably made by act of parliament. It is well known that in England, parliament, consisting of king, lords and commons, is supreme, and parliament has never delegated this jurisdiction to the courts of law; but has intervened, and probably would do so again. If a question, for instance, of legitimacy, should arise there, however, it might perhaps be decided by the courts, if the high court of parliament did not choose to interpose.

But however this may be, our form of government is quite different. The people possess originally all sovereignty; they delegate only a portion of this power, which, by the fundamental act, they divide as they see fit. In the case in hand, they have said that the executive power which they define, should be vested in a governor who shall have certain qualifications, and be elected in a certain manner; they give the judicial power to the courts.

Who shall decide whether the conditions have been complied with, the constitution being silent on this point?

The counsel for the respondent were driven into the position that the actual possession of the executive power could be removed only by a revolution. We cite the observations of one of the judges upon this point.

"The constitution has prescribed certain qualifications for the office of governor, and yet we are told that the incumbent of that office is the sole and ultimate judge of his own qualification. The constitution provides that no person but a citizen of the United States, and a qualified elector of the state shall be eligible to the office of governor; yet we are told whosoever can usurp or intrude into that office is the sole and ultimate judge of his own qualification, and that there is no power to inquire whether he be

in fact a citizen or a qualified elector of the state. Any man who can intrude into the office, is to decide upon his own qualification, declare himself a citizen and an elector, or at least a successful intruder, in defiance of the constitutional prerequisites."

"Again — the constitution provides that the person having the highest number of votes shall be governor; yet we are told, any man who by force or fraud can get possession of the office must be the sole and ultimate judge of his own election; that not the highest number of votes shall constitute him governor, but his own judgment must decide the matter, and his own will the ultimate tribunal by which his election is to be determined."

"Again — the constitution provides that 'in case of the impeachment of the governor, or his removal from office, death, inability from mental or physical disease,' &c., 'the powers or duties of the office shall devolve upon the lieutenant governor,' and yet he is the sole and ultimate judge of his own qualifications, of his own 'impeachment,' of his own removal from office, of his own 'inability from mental or physical disease!' If the mental disease amounts to lunacy, yet he is the sole and ultimate judge of his own sanity! If he be removed from office, yet he is the sole and ultimate judge of that fact, and of the jurisdiction of the authority by which he is removed! These, and the like, are the doctrines which this court is called upon to declare as the law of the land."

"If the lieutenant shall chance to imagine the governor insane, and take upon himself the duties of the office, and get possession of the 'department,' the governor might not be satisfied with the decision of the lieutenant, and yet both would be the sole judges of their respective sanity, while the secretary of state might deem them both mad, and mentally disabled, and himself pronounce the 'ultimate' decision in his own favor, and act the governor while he should think the disability continued."

"To such confusion, not to use a term less mild, do the propositions assumed and insisted upon lead us. While 'the soil of England has been drenched by the best blood of her sons' in the process of determining the right of contestants to the chief magistracy of the realm, it is the boast of the states of this Union, that they have provided peaceful and constitutional means by which pretensions to the executive magistracy shall be determined. To avoid the danger of usurpation they have prescribed certain qualifi-

cations, without which no man can gain accession to the office. To secure fidelity to the trust, and responsibility for its due execution, they have prescribed short terms of office, at the close of which the incumbent retires from the place, to be filled again by himself or another as the people shall elect. But if all these constitutional rquirements can be overridden by any bold and temporarily successful aspirant, every one must perceive that all these constitutional safeguards are vain and useless, and our soil is liable to be drenched with the best blood of our people at every returning gubernatorial election, and instead of the protection of the constitution and the law, we are solely dependent for the peace of the state and the supremacy of the law upon the mere forbearance of the retiring incumbent or the aspiring candidate."

The fallacy, which was well exposed in argument at the trial and by the court, consists in confounding the officer with the office. That the executive is independent, and within the appropriate sphere, even supreme, is admitted; but is A. B. the executive. The courts have jurisdiction of the person of A. B., they can inquire whether he owes a debt to C. D., why not then, whether he has intruded into an office of which C. D. is rightfully entitled? Have they not then jurisdiction of the subject? It is admitted that they may inquire in the case of inferior officers, sheriffs, county commissioners, and all others. The cases are continually coming up, and may be found in the books of reports of nearly every state. What is there in the nature of the office or dignity of governor, that puts it beyond the reach of inquiry? Its impor-tance? That would seem to be a strong reason for securing a trial, both for the sake of the parties directly interestedand of the sovereign, whose affairs are to be intrusted to the successful candidate.

We can see nothing in the nature of the office to distinguish it, *in kind*, from all others.

It is true this precise controversy has never been decided in any of our courts. In many states, the constitutions provide a tribunal for trying this title, either a special one, or the ordinary courts of law. In New York, the controversy once arose between John Jay and George Clinton; the law made the legislature the final judge, and Mr. Jay acquiesced in their decision. Perhaps it might be fairly questioned whether, in the absence of constitutional enactment, the legislature can assume themselves, or delegate to others, not judicial officers, the power to decide finally on

a question apparently judicial. Mr. Jay did not raise the point, nor was it taken in the present case; the law of Wisconsin not having, in the opinion of the judges, made the decision of the canvassers final.

It is true also, that the courts ordinarily undertake to know judicially and without proof who is governor.

But this is only a rule of evidence for the convenience of administering justice, and must not be extended to defeat justice. Courts recognize the governor, as they do all other public officers of the state, because it would be very inconvenient to examine the question of title of every officer, in every suit in which any act of his came in question.

This rule of convenience only applies when the question comes up incidentally. If the very issue to be proved is the title of the officer to hold his office, it is open to plea and proof. So a judgment of court cannot be collaterally impeached, but it may on error or review. And this is all which, on this point, the case of *Luther* v. *Borden*, 7 Howard, can be taken to intend. The learned and venerable chief justice there says, that courts will not inquire what the constitution of their own state is, but will take notice of it. As applied to the case before the court, the observation is perfectly true, but we do not suppose it was intended to mean, that if the question could be brought up in a direct form by any appropriate process, whether a constitutional amendment had been duly passed and adopted, and no tribunal had been appointed to try it, the courts holding under the original constitution would not be competent to investigate that question.

Lastly. It was argued, that this was a political matter with which the courts should not meddle, and *Luther* v. *Borden* was again cited. In that case, the courts of the United States recognized the governor who had been recognized by the president. But this was a matter *quasi* foreign to the United States courts. Those courts sit and hold a qualified jurisdiction in the midst of sovereign states; the relations of the general government with the particular governments, are regulated by the constitution and laws of the United States, and these (as construed) invest the president with power to decide, in certain contingencies, who shall be recognized as governor of a state. He had decided in this instance, and the courts held themselves bound by his decision, as they have by the decision of the legislature and president, in questions of sovereignty with foreign nations.

There is no analogy, therefore, between that case and the present, unless the constitution of Wisconsin has made the governor judge of his own title, which we have already seen is not the fact.

On the whole, we believe that the decision of the court is plainly in accordance with all the theory and practice of our form of government, and is fit to stand for a precedent, though not often, we hope, to be invoked.

Recent American Decisions.

United States Court of Claims.

J. Alexis Port *v.* The United States.

Where during the war with Mexico, property was seized in Mexico as enemy's property, and sold by order of the officer in command, there was an implied warranty of title by the U. States to the purchaser. *Quære*, as to the amount of compensation on failure of title.

The opinion of the court was delivered by

Gilchrist, C. J.—The facts in this case, as they are stated in the petition, are, that on the 12th day of September, 1847, Colonel Childs, the officer commanding at Puebla, ordered Captain Webster to "sell at auction some captured tobacco, and dispose of the proceeds as he will be hereafter directed." In obedience to this order, Captain Webster advertised on the 16th of October, for sale, at auction, on the 19th of October, five hundred bales of tobacco. On the 21st day of Obtober, the claimant purchased the tobacco for the price of twenty-five dollars per bale, amounting to the sum of $12,000, for which he paid $8000 in cash, and gave the United States credit for $4000, they being then indebted to him for supplies furnished the army.

The first question that arises is, what are the rights and liabilities of the claimant and the United States after the sale of the tobacco and the payment of the price by the claimant.

In this case there were all the elements necessary to constitute a contract. The United States and Mexico were at war. The American army was in actual possession of a considerable portion of Mexico, and, by the law of nations, had a right to seize the property of the Mexican government as lawful prize. Colonel Childs had, for the time being, supreme civil and military authority in the military department of Puebla, and in his then existing capacity he represented the United States, whose officer and servant he was. His authority, as the head of the army, could not be resisted; for this was especially a case where, from necessity, the laws must be silent in the presence of a victorious army.

The principles regulating the rights of nations at war, when an army is in possession of an enemy's country, are clearly established by the writers on the law of nations. "When the sovereign or ruler of a state declares war against another sovereign, it is understood that the whole nation declares war against another nation." . . "Hence these two nations are enemies, and all the subjects of the one are enemies to all the subjects of the other." Vattel, B. 3, ch. 5, § 70. "Everything, therefore, which belongs to that nation, to the state, to the sovereign, to the subjects, of whatever age or sex, — everything of that kind, I say, falls under the description of things belonging to the enemy." Ib. § 73. "We have a right to deprive our enemy of his possessions, of everything which may augment his strength and enable him to make war." Ib. B. 3, ch. 9, § 161. "As towns and lands taken from the enemy are called *conquests*, all movable property taken from him comes under the denomination of *booty*. This *booty* naturally belongs to the sovereign making war, no less than the conquests, for he alone has such claims against the hostile nation as warrant him to seize on her property and convert it to his own use." Ib. § 164. "The property of movable effects is vested in the enemy from the moment they come into his power." — Ib. B. 3, ch. 13, § 196. As to movables captured in a land war, it has been sometimes stated to be merely requisite that the property shall have been twenty-four hours in the enemy's hands; but other writers hold that the property must have been brought *infra presidia;* that is, within the camps, towns, ports, or fleets of the enemy; and others have drawn lines of an arbitrary nature. Marten's Law of Nations, 290, 291; 2 Wooddes. Vin. L. 444, § 34. But in respect to maritime captures, a more

absolute and certain species of possession has been required, in order to obviate the right of postliminium, such as a sentence of condemnation, to give a neutral purchaser a title to a prize vessel. Case of the *Flad Oyen*, 1 Rob. 134; 8 T. R. 270. "Immovable possessions, lands, towns, provinces, &c., become the property of the enemy who makes himself master of them; but it is only by the treaty of peace, or the entire submission and extinction of the state to which those towns and provinces belonged, that the acquisition is completed, and the property becomes stable and perfect." Vattel, B. 3, ch. 13, § 197. The conqueror who takes a town or province from his enemy, cannot justly acquire over it any other rights than such as belonged to the sovereign against whom he has taken up arms. War authorizes him to possess himself of what belongs to his enemy; if he deprives him of the sovereignty of that town or province he acquires it, such as it is, with all its limitations and modifications. Ibid. § 199.

In a condition resulting from a state of war, if property be seized under an erroneous supposition that it belongs to the enemy, it may be liberated by the proper authorities; but no action can be maintained against the party who has taken it in a court of law. In England no municipal court, whether of common law or of equity, can take cognizance of any questions arising out of hostile seizure. *Le Caux* v. *Eden*, 2 Dougl. 573. So, if booty be taken under the color of military authority by an officer under the supposition that it is the property of a hostile state or of individuals which ought to be confiscated, no municipal court can judge of the propriety or impropriety of the seizure; it can be judged of only by an authority delegated by his majesty, and by his majesty ultimately, assisted by the lords in council. There are no direct decisions on such questions, because, as was stated by Lord Mansfield in *Lindo* v. *Rodney*, 2 Dougl. 313, they are cases of rare occurrence. *Le Caux* v. *Eden*, 2 Dougl. 592.

It is to be remembered that we are now examining this case upon the supposition that the allegations in the petition are true, and the general question is, whether, supposing them to be true, a proper case is presented for the taking of testimony. The United States were in possession of a quantity of tobacco captured from the enemy during the war with Mexico. Under this general question the first inquiry is, whether, when, a person sells personal property in his possession, there is an implied warranty that he has a title to such property.

In most of, if not all, the cases in this country, wherever the question has been raised, it has been held that in every sale of personal property there is an implied warranty of title. Some of the decisions to this effect are, *Defreeze* v. *Trumper*, 1 Johns. 274; *Bayard* v. *Malcolm*, Ib. 469; *Rew* v. *Barber*, 3 Cowen, 280; *Case* v. *Hall*, 24 Wend. 102. In *Vibbard* v. *Johnson*, 19 Johns. 78, it is said: "There is no doubt that in every sale of a chattel for a sound price, there is a tacit and implied warranty that the vendor is the owner, and has a right to sell." In *Coolidge* v. *Brigham*, 1 Met. 551, the court said: "In contracts of sale, warranty is implied. The vendor is always understood to affirm that the property is his own. This implied affirmation renders him responsible if the title is defective." In *Boyd* v. *Bopst*, 2 Dale, 91, it was said by the court: "The possession of chattels is a strong inducement to believe that the possessor is the owner, and the act of selling them is such an affirmation of property that on that circumstance alone, if the fact should turn out otherwise, the value can be recovered from the seller." There are numerous other cases to the same effect, which need not be particularly adverted to for the present purpose. The same doctrine is stated in Story on Contracts, § 535, where numerous English cases are cited by the author in support of his position.

In 1 Law Reporter United States, 272, there is a careful and discriminating analysis of the decisions upon this point by Mr. Pike, of Arkansas, in which the writer comes to the conclusion that the law of England on this subject is like the civil law, and that there is an implied warranty, not of title, but of undisturbed possession and enjoyment. It is immaterial, in the present case, what is the precise character of the implied warranty, whether it be one of title, or of peaceable possession only, because the United States were not only in possession and sold the property, but it has been taken from the possession of the purchaser, who is seeking to recover damages for the breach.

In judicial sales, where property is sold by the marshal under an order of court, it is held that no warranty is implied. *The Monte Allegre*, 9 Wheat. 644. But this was not a judicial sale. It was simply a sale by the United States, acting through their officers in an enemy's country, of property in their possession, to which they claimed a title by the right of war; and we see no reason why they should stand in any better possession, in regard to prop-

erty in their possession, than a private citizen. The sale was in obedience to an order from the commanding general to his military subordinate. We cannot regard the general as a court of law, or Captain Webster as an officer of a court; for this would tend to confound all the distinctions that exist between a state of peace and a state of war in regard to the rights of property.

If, then, there be nothing in the other facts in the case to alter or modify the conclusion, the claimant must be held to have established a right of action against the United States.

But the counsel for the claimant puts his case upon still another ground. He contends that the tobacco belonged to the United States by the rights of war and of conquest, that they sold it to him, and then took it away from him, making him thereby liable in damages to his vendors.

That, upon the facts stated in the petition, we must consider the tobacco as property captured in war by the army of the United States; we think there is no doubt. It was taken by an authority which, for the time being, was supreme. Mexico, so far as it was actually occupied by a competent military force, was, for the time, a conquered country. In the rights of conquest all ordinary civil jurisdiction and remedies were merged. In all that the commanding officer did, so far as he was justified by the law of nations, he represented the country by whose authority he was in command of a military force. It was by this authority, under the law of nations, that the tobacco must for the present be considered to have been captured, and also that it was the property of the enemy. When captured, it was not the private property of the captor, but it became the property of the sovereign, according to Vattel — in this country, of the United States. The people, acting through the only agents who could, from the necessity of the case, be recognized, that is, the officers in command, sold it to the claimant, who paid the consideration for it. It then became *his* property, and, after such a sale and payment, the United States had no greater right to take the property into their possession, without indemnifying those who might have a claim to it, than any individual would have to take property from his vendee, on the ground that he had no right to sell it.

It appears from the petition, that, after the sale of the tobacco, the petitioner was informed that it was claimed by a merchant of Puebla, by the name of Domerq, and

that a board of inquiry was convened by order of Gen. Lane, consisting of four officers of the army, for the purpose of examining into the matter, a majority of whom reported that the tobacco was not at the time of the sale the property of the United States, and they awarded the possession and ownership thereof to Domerq, and that the consideration paid by the claimant should be returned to him, which was accordingly done. Subsequently, upon its being reported to Gen. Lane that the last buyer of the tobacco refused to give up the key of the store-house, an officer and a file of men forcibly seized and delivered the tobacco to Domerq.

This must be considered as the act of the United States. It stands on the same ground with the sale of the tobacco. The United States, through their officers, were in the actual possession of the supreme civil and military authority. With such a responsibility upon him, the commanding officer must, *ex necessitate*, act with promptness and decision. In a state of war, where the ordinary tribunals are silent, a nation must expect to incur the risk of pecuniary liability for the acts of its officers in a foreign country, whose course of conduct must be determined by what seems best under existing circumstances. It would be unreasonable in the extreme to require of military officers, carrying on war abroad, placed in difficult and trying positions, either the experience or the legal skill that would enable them to appreciate the subtle distinctions which at home, and in a time of peace, are applied to the ascertainment of legal rights. It is a necessary consequence of a state of war that the orders of the general can admit neither of argument nor resistance. It is the *nation* that carries on the war, and not the individual officer; and it follows that the nation must be liable for the acts of such agents as it sees fit to employ in the prosecution of its object.

Our conclusion is, that if the allegations in the petition are proved, the claimant is entitled to some damages from the United States. Whether the claimant is entitled to recover any sum beyond the consideration paid by him, by reason of his liability to subsequent vendees, is a question which can more conveniently be examined when all the evidence relating to damages is laid before us. At present, we shall merely order testimony to be taken.

SAMUEL M. PUCKETT *v.* THE UNITED STATES.

In sales by U. States marshal of lands taken in execution at the suit of the U. States there is no implied warranty of title.

On failure of the title, the purchaser has no claim to recover the purchase money of the U. States.

THE opinion of the Court was delivered by

GILCHRIST, C. J. — This claim is, substantially, an action against the United States for money had and received. It appears from the petition that the United States marshal for the district of Mississippi sold certain fractional sections of land situated in Neshoba county, in Mississippi, as the property of one Wily P. Harris, to one John E. Richardson, for the sum of $10,689.41. The claimant, and one Gooch, became sureties for Richardson for the payment of the purchase-money, and, subsequently, the claimant became a partner with Richardson in the purchase, and signed promissory notes for the same, payable to the United States. Suits were instituted upon the notes, and judgment obtained thereon, against the makers for the amount due, including interest and costs. The claimant paid the sum of $5000, which passed into the treasury of the United States, and, subsequent to the payment of the money, he ascertained that the lands sold as the property of Harris in fact belonged to other persons, and that Harris never had any title to them, and, consequently, no title could pass by virtue of the sale by the United States. The sale was made without any notice of any defect in the title, and under the assurance by the marshal that he would make a title at a future time; which, however, has not been done.

The claimant alleges that the consideration of the notes has totally failed, and that he is entitled to recover of the United States the sum of $5000, with interest.

The assurance by the marshal that he would make a title to the land at a future day cannot be the foundation of any right in the claimant. Whatever evidence his declarations may furnish of his personal liability in a suit against himself, they cannot bind the United States. If he steps out of his official duty, and does what the law has given him no authority to do, he may make himself personally responsible, and the injured party must look to him for redress. He is the mere minister of the law to execute the order of the court, and a due discharge of his duty does not require more than that he should give to purchasers a fair opportunity of examining and informing

themselves of the nature and condition of the property offered for sale. *The Monte Allegre*, 9 Wheat. 645. Nor upon a judicial sale, which we presume this to have been, is there an implied warranty of title. Neither the marshal nor the auctioneer, while acting in the scope of their authority, can be considered as warranting the property sold, nor can the marshal do any act that shall expressly or impliedly bind any one by warranty. Ib. 645. It is on the same principle that it is held in South Carolina that there is no implied warranty in a sale of land made by the ordinary for partition, and the purchaser who has been evicted by title paramount cannot recover the purchase-money back from the ordinary, though it still remains in his hands undisturbed. *Evans* v. *Dendy*, 2 Speers, 9.

So it has often been held that there is no implied warranty in a sheriff's sale. *Yates* v. *Bond*, 2 McCord, 382; *Davis* v. *Murray*, 2 Rep. Con. Ct. 143; *Bashore* v. *Whistler*, 3 Watts, 490. In South Carolina, where one purchased land at a sheriff's sale, to which the defendant in the execution had no title, the sheriff may compel him by action to pay the purchase-money without having first tendered the sheriff's titles. *Moore* v. *Akin*, 2 Hill, S. C. 403.

As there is no implication of a warranty, the question arises whether, upon the principle which regulates the action of assumpsit for money had and received, the claimant can recover of the United States the consideration he has paid.

It is provided by the 1st section of the act of May 7, 1800, (2 St. at Large, 61,) that when the United States shall have received seisin and possession of lands delivered in satisfaction of a judgment, it shall be lawful for the marshal of the district "to expose the same to sale at public auction, and to execute a grant thereof to the highest bidder on receiving payment of the full purchase-money; which grant so made shall vest in such purchaser all the right, estate, and the interest of the United States in and to such lands or other real estate." Although there is no express statement to that effect, we can make no other inference from the petition than that the lands mentioned were sold by the marshal by virtue of the authority vested in him by this act. If such be the case, he can do no more than to convey to the purchaser such right and interest as the United States possessed, and therefore the case is like that where a person releases to another all his

right and interest in a tract of land, and receives the consideration therefor. If, in such a case, the grantee can recover of the grantor the consideration he has paid for the release, on the ground that the consideration has failed, then this claimant has a right to recover of the United States.

It has been repeatedly held that where money is paid for land conveyed by deed of release and quit-claim, it cannot be recovered back, though the title be wholly defective, unless there be fraud on the part of the vendor. — *Gates* v. *Winslow*, 1 Mass. 65; *Wallis* v. *Wallis*, 4 Mass. 135; *Emerson* v. *Washington County*, 9 Greenl. 94. In the case of *Soper* v. *Stevens*, 2 Shep. 133, it was held that where a note, given in consideration of a quit-claim deed of land, and where there is no fraud, has been paid by the grantee, the money cannot be recovered back on the eviction of the grantee by an older and better title. In all such cases as have been cited, the money is considered as having been paid in consideration of the conveyance of the interest the grantor has in the premises, such as it may be, and not in consideration that the grantor will convey a good title to the land. The grantee buys only what the grantor has to sell, and where, without fraud, he sells only his interest, the consideration cannot be said to have failed, so as to give a right of action to the grantee. The United States are entitled to the benefit of this principle, and, so far as the facts appear in the petition, there is no more reason for permitting the claimant to recover than there would be for rendering a judgment for the plaintiff upon a similar state of facts in an ordinary suit at law. Our opinion is, that upon the case stated the claimant is not entitled to recover, and that there is no principle of law that would authorize us to order testimony to be taken.

Abstract of other Recent Decisions of the Court of Claims.

NICHOLSON *v.* THE UNITED STATES.

OFFICER, EMPLOYÉ. — An act of congress, passed August 26, 1852, provided for the election of a public printer for each house of congress, and fixed the rate of compensation to be paid for printing. On the first day of March, 1854, the claimant was elected public printer of the house of representatives.

Held, he was an "officer" and "employé" of the "legislative department of the government," and, as such, entitled to the increased compensation provided by the joint resolve of 20th July, 1854, for the officers, clerks, messengers, and other employés of that department.

Spence et al. *v.* United States.

Insufficient Protest. — Where by mistake, the weight of goods imported, was overstated in the invoice, but the mistake was discovered before the duties were paid, and the correct weight was shown by the weigher's return, but the collector insisted upon payment of duty upon the invoice weight, which was paid by claimant.

Held, claimant had a good cause of action against the government in this court, for the amount of duties overpaid, although his notice and protest were not sufficient to enable him to maintain an action against the collector.

Lindsay *v.* The United States.

Jurisdiction. Case within discretion of Congress.— In a case wherein the claimant has no legal cause of action against the United States, founded upon a law of congress, or upon a regulation of an executive department, or upon a contract express or implied with the government of the United States, this court cannot recommend specific action by congress.

The court will, however, in a case which shows an equitable claim, report the facts, and a bill to be acted on by congress as they may deem proper.

Thus, if a person has bought in good faith, and for its full value as an estate in fee simple, certain land reserved to the friendly Creek Indians, which the Indians and their heirs had the right to occupy forever, but not to dispose of, this course will be taken.

District Court of the United States for the District of Massachusetts. Special Term. January, 1856.

Benjamin R. Gifford, Libellant, *v.* Lemuel Kollock.

Where a minor shipped for a whaling voyage, under the direction of his father, who furnished his outfit of clothing, the libel was rightly brought in the father's name.

A description of a whaling voyage, *To the North Pacific Ocean and elsewhere*, is a defective description. A contract for a voyage that has no termination of time or place, is a void contract.

If the usage of a particular port, or a particular trade, authorizes an interpolation of the port of departure as the port of termination, this must be qualified by another implied term, that the return of the vessel to her home port shall be within a reasonable time.

A whaling voyage is properly a cruise for taking whales, and does not include a trading voyage to dispose of the cargo after it is obtained.

If the master undertakes such a voyage, it seems that men engaged for the whaling voyage are not bound to continue in the vessel.

By the ancient maritime law, constituting the common law of the sea, desertion by seamen, during the voyage, works a forfeiture of all wages previously earned. But the law is not imperative. The court may take into consideration palliating circumstances, not amounting to a justification, and mitigate the penalty to a reasonable indemnity to the owners.

The only case of desertion in which the forfeiture is absolute of the whole wages, is when all the requisites of the statute have been strictly observed. Statute July 20, 1798.

The material parts in the case are stated in the opinion of the court.

Ware, J. — This is a libel filed by Benjamin R. Gifford, against Lemuel Kollock, of New Bedford, owner of the ship Alice Frazier, for the *lay* or share earned by his son, a minor, in a whaling voyage. The description of the voyage in the shipping articles, it is argued, was a whaling voyage to *the North Pacific Ocean and elsewhere*. Young Gifford shipped September 10, 1851, being then between fifteen and sixteen years of age, and continued in the ship till March 9, 1855, three years and seven months. On that day the ship being at Melbourne, in Australia, and it being the day before she sailed on her return to her home port, he deserted. During the whole period up to the time of his desertion, it is admitted that he performed his duties in an unexceptionable manner, and that his deportment was uniformly satisfactory to the master. Indeed, so well satisfied was the master with his conduct, as well as with his ability and fidelity as a seaman, that he was promoted from a foremast hand to be a boat-steerer, an office which, according to the usage of this trade, entitled him to an increased compensation.

The first objection to the libel made by the respondents is, that the suit is not rightly brought by the father, but that it should be in the name of the son, and that the recovery, if any be had, should be for his benefit. My opinion is, that this objection cannot prevail. The shipping articles are not produced, but it is proved that the son signed them, or that the father witnessed his signature. It

further satisfactorily appears that the father made the contract and all the arrangements for the voyage, furnishing his child with an outfit of clothing for a three years' voyage. There is no pretence of evidence that he renounced his paternal authority or rights, nor is there any show of proof that the son claimed to be an emancipated minor, and entitled to his earnings, but the contrary is clearly inferable from the whole evidence. A parent is not on slight circumstances to be presumed to abandon his right of control over his children during their minority; and while he performs his parental duties of providing for their support and education, he is entitled to the proceeds of their labor. My opinion is that the suit is rightly brought in the parent's name.

The second objection relied on, and this is the important question involved in the case, is, that whatever lay or share, which is in the nature of wages, might be otherwise due to the parent, all his son's earnings were forfeited by his desertion at Melbourne. It is not claimed that the statute forfeiture has been incurred. But then it is said that, independent of the statute, a forfeiture is incurred under the common and ancient maritime law. It is certainly true, that desertion does by the maritime law work a forfeiture of all wages previously earned in the course of the voyage.[1] The reply of the libellant to this is in substance a denial of the fact. It is contended that the voyage, according to the just interpretation of the contract, terminated *de facto* at Melbourne, and there can be no desertion after the voyage is at an end.

It is admitted that the voyage described in the shipping articles, was "a voyage to the North Pacific Ocean and elsewhere." Whatever objection there may be to the vagueness of the term *elsewhere*, in the description of a common trading or freighting voyage, it does not seem to apply with so much force to a whaling voyage. Such a voyage may perhaps be properly enough described as a cruise on the high seas in search of whales. They must be sought where they are to be found, and from their migratory habits they are not always to be found in the same

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[1] In all times since the revival of commerce in the middle ages, desertion has been held to incur a forfeiture of wages. *Consulate de la Mer.* ch. 268. *Transl. of Baucher.* It appears from several chapters of the Consulate of the Sea, that in early ages the service of seamen was considered as in part, at least, a military service. Chap. 169 to 178. And by some of the old ordinances, desertion is punished with the severity of military law.

parts of the sea. The nature and object of the voyage does not admit of any particular description of the localities intended to be visited. But the objection in this case is of a different character. The voyage described contains no *terminus*. The enterprise for which young Gifford engaged, may be said to have been completed when the vessel was filled with oil. But the contract does not say when or where the voyage shall end. An engagement for a voyage that has no termination in time or place, cannot be a binding contract. Now it is not denied that the cruise for whales, the enterprise for which Gifford engaged, terminated at Melbourne. Nothing remained to be done but to dispose of the cargo. But this constituted no part of the service for which the crew engaged. When the cargo is brought into port, it is the part of the owners to convert it into money and distribute the proceeds.

After the cruise was ended the vessel went to Sydney and Melbourne, in Australia, and at the latter port disposed of part of her cargo. It does not distinctly appear from the evidence, whether the object in going to these ports was to sell her cargo or to obtain supplies, but it seems that at least in part, the object was trade. It is on this ground argued that the voyage properly terminated then. The enterprise, the object of the voyage, so far as the engagement of the crew intended, were accomplished.

It was stated at the argument that in shipping papers of vessels engaged in the whale fishery, it is an understood term of the contract that the voyage terminates on the arrival of the ship in her home port. If it is so, it ought to be so expressed. But supposing this term to be interpolated, it must in all fairness be qualified by another understood term; that is, when the vessel is full, and a return cargo is obtained, the vessel shall return to her home port with no unnecessary delay. If, on her return, she should touch at one or more ports on her way, and dispose of a part of her cargo without materially prolonging the voyage, a court might not readily hearken to a complaint on the part of the crew. But it is to be remembered that when the cruise is at an end, the seamen cease to earn wages; and that it belongs to the owners to dispose of the cargo for the common benefit of all interested. If the master deviates from his course home, and goes to a foreign port to seek a market for his oil, this is a departure from the voyage for which the seamen engaged. It is the commencement of a trading voyage. If he may deviate to seek a market

in one port, it is difficult to say that he may not in two or more, and the period of service for the crew be indefinitely prolonged, without any addition to their compensation. This, it seems to me, would be such a breach of the contract on the part of the master, as would liberate the crew from their obligation to continue in the ship. But the evidence with regard to their stopping at the ports of Sydney and Melbourne, whether it was a deviation from the course of the return voyage, and whether it was exclusively or mainly for the purpose of trade, is not so full and clear that I feel prepared to place the decision of the cause on this point.

But even in this question, admitting the construction of the contract contended for, that the termination of the voyage was the arrival of the vessel at her home port; and further, that there was no deviation that would excuse the seaman for leaving her, are the owners in a condition to enforce the forfeiture against the *parent*, under the general maritime law? The statute appears to be peremptory. If there is a wilful absence of more than forty-eight hours, and *all the requisites of the statute are exactly complied with*, the forfeiture is absolute. It is declared that the wages shall be forfeited, and it seems to leave no discretion to the court. Nothing short of a justification of the desertion, such as extreme severity or cruelty on the part of the officers, it seems, will authorize the court to decline to apply the forfeiture. But it is admitted that this case is not brought within the statute.

But the maritime law, as I understand it, is less imperious, and trusts more to the conscience and discretion of the court. Desertion, that is, leaving the vessel with the intention of abandoning it and not returning, works a forfeiture. Such is the general rule. But after a desertion, if the seaman repent and returns, the law is indulgent. It is then considered not as a case of total forfeiture, but as one for compensation and indemnity to the owners for the loss of service; and the seaman is punished and the owners indemnified by a proper deduction from his wages. The law looks with indulgence on the faults of seamen when they are free from malignity, and arise from thoughtlessness, improvidence, and that want of consideration which is so characteristic of them as a class. In some cases it inflicts its penalties with gentleness and reluctance; and in so doing it will look to the conduct of the officers towards the men, as well as make some allowance for the habitual improvi-

dence of the men. And this it will especially do, when such conduct may in any way have tended to produce the fault which it is sought to punish.

The libellant, the father, has, I think, just cause of complaint in regard to the conduct of the master towards this boy, in two particulars. The *first* is, that after the desertion, though he remained in port a day before sailing, he made no effort to find him and bring him on board. He knew him to be a minor intrusted by a parent to his care, and whose conduct is admitted to have been exemplary through the whole of three years and seven months' service. Yet so far as the evidence goes, he not only made no attempt to find the boy and bring him back, but did not even inquire for him.

The second fault of the master was in the unreasonable advances he made to the boy during the voyage. He knew, or ought to know that he was not earning wages for himself; or if he was ultimately to have them, that they were claimed by the father, if not for his own use, at least in trust for his son. Young Gifford was furnished with an outfit of clothing for three years, and he remained in the vessel but seven months longer. He could need but little for clothing, and yet the master has charged against him three hundred and fifty dollars. One hundred was paid to him at one time, and fifty at another. What reasonable cause could there be for such advances? It was quite impossible that they could be required for necessaries. And it should be further observed, that the very witnesses whom the owners rely upon to prove the desertion, that is, that Gifford left the vessel with the intention of not returning, also prove that the cause of it was, that he was afraid to go home and meet his father with such advances charged against him.

Whether advances to this amount are legally chargeable on the wages, in a suit by the parent and natural guardian, without some evidence to show that under the circumstances they were reasonable and proper, need not be considered in the present stage of the case.

The only question now to be determined is, whether there having been an admitted desertion under the general maritime law, but not brought by the proof within the conditions of the statute, the court is bound to visit the offence with the penalty of a forfeiture of the entire wages; or whether, by the maritime law, this court has authority to take into consideration circumstances of palliation, not

amounting to a justification, and mitigate the penalty to a reasonable and proper indemnity to the owners, for any damage they have sustained from the delinquency of the seaman. My opinion is, that the court has that power; and that the facts in proof make this a proper case for exercising it.[1] It seems to me to be unconscionable and unjust to mulct this boy, supposing him to have a substantial, though not a legal and technical interest in his wages, of the entire earnings of more than three years and a half laborious and dangerous service, for a fault, blamable indeed, but which was induced mainly, if not exclusively, by the improper conduct of the master. If in consequence of the desertion the owners have sustained any damage, as is suggested, the proof being produced, it should be deducted from the wages.

Mackie and *Cushman*, for libellant.

Eliot and *Stetson*, for respondent.

January 10, 1856.

HENRY TABER ET AL. *v.* LEVI JENNY, JR., ET ALS.

A replication, merely denying the truth of the answer, is not required in this district; but where the libellant relies on new matter in avoidance, he should put it on the record by a supplemental libel, to which the respondents should reply.

When a whale has been killed, and is anchored and left with marks of appropriation, it is the property of the captors.

Where such whale is afterwards found by another ship, still anchored, there is no usage, or principle of law, by which the property of the original captors is divested, even though the whale may have dragged from its first anchorage.

Where two vessels are under a contract of mate-ship, there is no such joint property in a whale taken by one of them, as requires the owners of both to join in an action for its tortious taking.

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[1] Since this opinion was delivered, I have been favored through the politeness of the authors with the first volume of Blatchford and Howland's Reports, just issued from the press, containing the admiralty decisions of Judge Betts. It is an addition to our books of admiralty jurisprudence of very great value. The extensive learning and great experience of Judge Betts, give to his opinions a commanding authority. I find that the principal question involved in this case, has been repeatedly decided by him, that the only case in which it is imperative on the court to pronounce for an entire forfeiture of wages, is when the desertion is proved precisely according to the requirements of the statute. *The Cadmus*, 142; *The Martha*, 155; *The Elizabeth Frith*, 201; *The Union*, 555.

An award where one of the arbitrators has prejudged the cause, is to be set aside.

Even where the referees are unexceptionable, the umpire must rehear the case.

The measure of damages for the tortious taking of a whale, is to be full indemnity to the libellants for all they have lost by the taking at the time and place where it was taken, and no more.

What this will be is a question of fact, and the report of an assessor will not be disturbed unless it can be shown affirmatively that he is wrong.

If substantial doubts exist as to any of the elements of damage, they are to be solved against the wrong-doer.

This was a libel in admiralty, brought by the owners of the ship Hillman, of New Bedford, against the owners of the ship Zone, of Fairhaven, for damages from the alleged wrongful taking of a whale. The facts sufficiently appear in the opinion of the court.

The respondents, in their answer, in addition to other grounds of defence, set up an award made previous to the filing of the libel. The libellants admitted the fact of the award, but contended that it was invalid on two grounds. First, because one of the referees had formed and expressed an opinion against them before his appointment; and second, because the umpire appointed upon the disagreement of the original referees, had decided the case merely from the statements of the referees.

To this latter point, the libellants cited Russell on Arbitrators, 230, 231; *Falconer* v. *Montgomery*, 1 Dallas, 233; *Passmore* v. *Petit et al.*, 1 Ib. 271, and *Salkeld* v. *Slater*, 12 A. & E. 767.

As to the general question of property, they relied on the principles stated in Sander's Justinian, 181, 182, and Vinnius' Com. on Insts. 153.

Sprague, J. — The first question is one of practice; the only pleadings are the libel and answer. According to the practice in this district, a replication merely denying the truth of the answer, is not necessary; the allegations of the answer are deemed to be in issue without such formal denial. The answer here sets up an award of referees as a bar to the libel; the libellants not denying that such an award was made, insist that it was not binding for two reasons; first, that one of the referees had prejudged the cause; second, that the award was made by an umpire without hearing the parties. This is new matter in avoidance of the allegations of the answer, and should have been put on the record. This is sometimes done by a replication; but the more regular mode is by a supplemental libel, to which

there should be an answer by the respondents. The parties having come prepared to litigate these, as well as other points in controversy, and having engaged that a supplemental libel and answer shall be filed, so that all the issue shall appear upon the record, I proceeded at their request, to hear the cause, and will now state the conclusions to which I have arrived upon the merits.

This is a libel to recover the value of a whale. In the summer of 1852 the ship Hillman, of New Bedford, and the ship Zone, of Fairhaven, were whaling in the Ochotsk Sea. On the morning of the 23d of July, one of the boats of the Hillman pursued and killed a whale, but being alone and the ship being at a distance, and obscured by a fog, the boat was unable to take the whale to the ship, and for the purpose of securing it, anchored it in fifteen fathoms of water, with an anchor weighing about sixty pounds, and a double tow-line with about thirty-seven fathoms scope, and a waif was fixed upon it. This waif was a staff, about eight feet long with a flag at its head. After the whale was anchored, the boat lay by it nearly an hour to ascertain that it did not drift; the boat then went to the shore, which was not many miles distant. A few hours after the whale had been thus left by the Hillman's boat, a boat belonging to the Zone with her captain on board, came across the whale. The captain took down the waif and then went to his own ship, which was quite near; he there ordered his mate to get into the boat, go to the whale, and bring it to the ship. This was done. When the mate reached the whale, he found the tow-line and anchor attached to it, and they were both taken into his boat. The whale having been taken alongside the Zone, the crew of that vessel proceeded to cut it in, that is, to strip off the blubber and take it on board. In doing this they found two irons with the initials H. N. B., which clearly indicated that they had belonged to the Hillman, of New Bedford. These irons were taken on board the Zone, as were also the anchor and rope attached to it. These irons were left on deck, the anchor was put below. The Zone while cutting in the whale stood out from the shore, but on the day following, while boiling down, stood in. The Hillman's boat having returned to their ship, and obtained the assistance of other boats, went in search of the whale, but could not find it. This they did on the morning of the 24th. During that day the mate of the Hillman seeing the Zone boiling down, went on board of her and ascertained

that she had taken the whale. The irons were lying upon her deck, and he took them away. But he did not see or hear anything of the anchor and tow-line. The anchor was thrown overboard by the captain of the Zone, but at what time does not appear, except that it was before the 26th. The excuse given by him for this was violent and abusive language in his own cabin, by Captain Bennett. That such language was used, is in proof. But that cannot justify the act of throwing the anchor overboard. On the 25th, Captain Cook, of the Hillman, and Captain Bennett, of the whale ship Massachusetts, went on board the Zone and demanded of Captain Parker, her master, the bone and oil of that whale, which was refused. They were subsequently brought to Fairhaven, and taken and sold by the respondents. A demand for the proceeds was made upon them by the libellants and refused.

When the whale had been killed and taken possession of by the boat of the Hillman, it became the property of the owners of that ship, and all was done which was then practicable in order to secure it. They left it anchored with unequivocal marks of appropriation.

It having thus become the absolute property of the Hillman, was that ownership ever lost? It is contended that it was. First — by the usage peculiar to the whale fishery; or, secondly — by the principles of law applicable to the facts of this case. The usage contended for, is, that when a whale is found adrift on the ocean, the finding ship may appropriate it to her own use if those who killed it do not appear and claim it before it is cut in. But from the evidence it does not appear that this whale was found adrift. On the contrary, I am satisfied that it was anchored when taken by the boat of the Zone. (The judge here examined the evidence.) Whether it was found in the place where it had been left by the captors or had dragged the anchor, and if it had dragged, how far, is left in some uncertainty. I do not think it is shown to have dragged, certainly not to any considerable distance, and if it had, there is no proof of usage embracing such a case.

2d. By the general principles of law, when property is separated from the owner at sea by force of the elements, or even by abandonment from necessity, the person who finds it has not a right to convert it to his own use, and cannot thereby divert the right of the original owner. The finder in such case has only the right of a salvor, and must conduct in good faith as such. If he embezzles the prop-

erty, or wrongfully converts it to his own use, he may thereby forfeit his claim to salvage. In this case the whale was not derelict, it had not been abandoned by the owner, but had been left with the intention to return, and the captor did in fact return as soon as practicable, and in less than twenty-four hours. Whether the whale, when found by the crew of the Zone, was in a condition of peril so as to be the subject of salvage service, need not now be considered, as that question is not now before the court. It is not presented by the pleadings, nor by the propositions, or arguments on either side. Besides this, the conduct of the captain of the Zone was not that of a salvor, and was such as would have precluded him from now assuming that character. A ship or merchandise found upon the ocean is still the property of the original owner, however distant he may be, and even although he believes it to be absolutely lost. It may in such case be subjected to a lien for salvage, but still the property subject to such lien is in the owner, and when such lien is displaced, the ownership is absolute and unincumbered. If such be the law with respect to property found derelict and drifting upon the ocean, for still stronger reasons must the right of the owner remain in full force to property which he has anchored and left only temporarily, soon to return and repossess it. That this would be so as to a vessel or boat so anchored and left, no one would doubt. But the same principle applies to this whale. By capture, killing and possession, it had become the absolute property of the libellants, and the anchor, waif and irons, were unequivocal proofs not only that it had been killed and appropriated, but of the intention of the captors to reclaim and repossess it. It is in proof that the appearance of the whale was such, as to show to the finders that it could have been killed only a short time, not exceeding twelve hours. A whale not being the product of human care or labor, does not, of itself, purport to be human property, and what would have been the right of the finders, if the captors had abandoned it without any marks of appropriation need not now be considered. One other circumstance has been adverted to by the counsel for the respondents, as in favor of the right of the Zone. It is that the ships Massachusetts and Hillman were under a contract of mate-ship, and that on the morning of the day upon which Captain Parker found this whale, he had been on board the Massachusetts, and was told by her captain that they had seen no whales for three days, and that Cap-

tain Parker was thereby led to the belief that this whale could not belong to either of those ships, and that there were no others near; but the captain of the Hillman was not present at that conversation, and his right is not to be impaired thereby.

It is objected that the owners of the Massachusetts ought to have joined in this libel, because that vessel was under a contract of mate-ship with the Hillman, but it appears that such contract did not make the whale, when captured, the joint property of the two vessels, but would only give a right to the vessel which at the end of the season should have taken the lesser quantity of oil, to claim of the other one half of the excess, so as to make both equal. It is also insisted by the respondents, that this claim is barred by an award of referees. It appears, that the matter in controversy was verbally submitted to two persons as referees, with power if they should not agree, to appoint an umpire.

It further appears, that the referee who is named by the respondents, had previously formed and expressed an opinion in their favor; and that this was known to their captain, who aided in selecting him. The two referees heard the parties who introduced the two captains and other persons as witnesses. Not being able to agree, they appointed an umpire, who never heard the parties, or any of their evidence, but formed his opinion upon the statements of the two referees. And thereupon, an award was made in writing and delivered to the parties, but which the libellants refused to abide by. Such an award was not binding. The libellants had no knowledge that one of the referees had formed and expressed an opinion adverse to their right, and they never agreed that an umpire should make a decision without hearing the parties or any of their witnesses. This would have been necessary even if both the referees had been unexceptionable, but it was peculiarly important that the umpire should not depend merely upon the statements of the two referees, when one of them had prejudged the case. The libellants are entitled to recover.

As to the measure of damages. The libellants claim the whole amount for which the oil and bone sold at Fairhaven. But this is not the measure. The libellants are entitled to a full indemnity, but no more: they are to have all that they have lost by the taking of the whale from them in the Ochotsk Sea on the 23d of July, 1852. The case will be sent to an assessor, to ascertain and report the facts

necessary to be known before the court can determine the amount.

After the delivery of the foregoing opinion, the case was sent to E. H. Bennett, Esq., as an assessor, under an order directing him to ascertain and report "what was the value to libellants of said whale at the time and place it was taken possession of by the Zone — viz. on the 23d of July, 1852, in the Ochotsk Sea," with a direction to receive evidence of the opinion of competent persons as to the value; and also to report the quantity of oil and bone yielded by the whale.

After hearing the parties the assessor made a report, which was filed February 29th, in which he reported as follows: — "I report the value of said whale to the libellants at the time and place it was taken possession of by the Zone, was $2350. The respondents claimed, that by the terms of the order the assessor should take into consideration, in fixing said value, the risks and uncertainties that the proceeds of said whale would have been in fact realized by the ship Hillman, even if the whale had not been picked up by the ship Zone, and offered some testimony upon that point. If such risks shall be taken into account, I report the value at the time and place aforesaid to have been to the Hillman $2000." He also reported the amount of oil originally yielded by the whale to have been one hundred and twenty barrels, and the amount of bone one thousand eight hundred pounds. In the supplemental report, furnished at the call of the respondents, the assessor stated that he had arrived at the sum first reported by estimating the value of the oil and bone at the prices respectively at which the Hillman sold her cargo at her arrival at New Bedford in March 17, 1854, and deducting therefrom the cost of casks, five per cent. for leakage and shrinkage, insurance on the three quarters *not* covered by policy on outfits, and the small incidental charges usually incurred at the home port, such as wharfage, cooperage, &c., amounting in all to $378.80.

Upon the coming in of the assessor's report, the libellants excepted only on one point; the finding of the assessor as to the quantity upon the evidence reported, which they claimed should be fixed at one hundred and thirty barrels, instead of one hundred and twenty. The respondents also except to the finding of the assessor on this point; claiming that the quantity should be only one hundred and ten barrels, and excepted otherwise to the report

in the following particulars:—That no allowance was made for the freight of said oil and bone home; that no allowance was made for the labor of the Zone in cutting in and boiling out and stowing down said whale; and that no deduction has been made for the crew of the Hillman's share in said oil, which respondents maintained the libellants would save on account of releases given by witnesses, and the lapse of time.

These exceptions were argued before the court Feb. 29th.

SPRAGUE, J.—The first question presented is one merely of fact as to the amount of oil and bone originally yielded by this whale. This is an appeal from an assessor, and I shall not reverse his finding unless it is affirmatively shown that he is wrong. (The judge here reviewed the conflicting evidence.) On the whole, I cannot say that the assessor has made a mistake; he seems to have taken the medium, and I shall not disturb his finding. As to the last two exceptions, I have no doubt. The crew's claim is to a share of the proceeds of the voyage; and they have no property in the oil itself. The contract is, that out of the proceeds when realized they shall be paid according to their lays. It is the right and duty of the owners to protect the products of the voyage, and if unlawfully taken by any one to pursue and obtain them or the proceeds, and the seamen have then a right to share in the net avails. The owners must obtain and hold them for this purpose. Otherwise the seamen could not get redress; they have no title to the property, and could maintain no action for it. If the owners neglect to take proper means to obtain indemnity, they would be responsible to seamen for that neglect. It is not for respondents to say that the owners will not pay the crew. The respondents certainly have no right to their share; and an individual might as well say when sued by a guardian, that perhaps he might never settle with his ward.

As to the claim for allowance for cutting in the whale, and other labor expended by the respondents, the assessor has found that this would have cost the Hillman nothing to have performed herself. This I consider a question of fact; and I see no reason to think the assessor has not found correctly. Whether it would have cost anything depends upon the time, and whether the time could be made available and valuable for other purposes. This might be different under different circumstances. It is a question of fact, upon which, in this case, the assessor has

passed. The principle of law in admiralty applicable to this point is, that a party who has suffered a wrong, is to do what he reasonably can to diminish the consequences; he must use reasonable means to indemnify himself where he can. This general principle may be illustrated by a case which, at first sight, seems to have little analogy to the present — that of a wrongful discharge of a mariner abroad: Notwithstanding his claim upon the owners, he is bound to earn wages or his passage, coming home, if he can reasonably do so, taking into account his previous capacity; but if he has no opportunity, then he may recover full wages and expenses besides. It is only held that he must use reasonable means and not lie by. Applying this here, the Hillman was to use reasonable means to indemnify herself. She was not to neglect chances of filling up. If she had came home full, that would have diminished her loss. But upon the facts found, she cannot be called on to pay another ship for what would have cost her nothing. The answer to the claim made for the labor is, that it was done without request by the libellants, and without any benefit to them.

In regard to freight it is not quite so clear. But I cannot see that the assessor is in error. I do not find facts enough to show any benefit to the Hillman from the respondents bringing the oil. The burden is upon them to show that the Hillman has been benefited by their services before they can claim any compensation.

After the exceptions had been overruled as above, the libellants then moved that the first value stated by the assessor in his report be accepted. Upon this question whether any allowance shall be made for risks, the parties were heard and a decision reserved until March 8th, when the question was thus disposed of.

Sprague, J. — The question is, whether an allowance should be made to the respondents from the value of the whale for the risk that it would not have been found, or if found, that it would not have been cut in and the oil stowed down in safety. I think, on the whole, that no such allowance should be made; and I will state the reasons. It has been decided that this whale was the property of the libellants, and was converted to their own use by respondents. Now although I reject the doctrine of exemplary damages, yet the rule is, that *full indemnity* should be given. If substantial doubts exist, they are to be solved against the wrong-doer. Now, in this case, it is entirely uncertain

what the risk was. Indeed, there is a very high probability from the weather, and the nearness of the ship, that the Hillman would have obtained the whole value of the whale. To allow anything would deprive the libellants of property which there is high probability they would have realized. I am not aware that any such deduction has ever been made in cases analogous. It is evident that the whale might, at any time even after it was alongside, have been reclaimed without deduction or compensation.

Another principle in the maritime law embraced in the doctrine of salvage may be applied. The claim here is somewhat in the nature of a salvage claim; it is, that the respondents have saved the property from certain hazards. It is not necessary to consider whether this property was in any such risk, as under any circumstances to lay a foundation for a claim of salvage. But in all cases where any allowance is made for salvage, the property must be taken and saved for the owner; want of good faith may forfeit all claim for salvage. I shall, upon these grounds, refuse any allowance for the risk, and accept the first value reported by the assessor.

A question being made as to interest, the court allowed it from the time when the Hillman discharged her cargo, March 25th, 1854.

A decree was then entered in conformity with the above for the libellants, in the sum of $2625.33 and costs.

T. D. Eliot, and *R. C. Pitman*, for libellants.

L. F. Brigham, for respondents.

STEELMAN, LIBELLANT, *v.* TAYLOR.

Quære, how far the responsibility of the master of a vessel for the accuracy of the accounts of the lading and delivery of a cargo, may be affected by the usage of a particular trade.

In a common contract of affreightment, the master is entitled to full freight on all the goods laden and borne on the bill of lading, though they may be by natural causes, and without his fault, deteriorated in quality, or diminished in quantity when delivered.

THE material facts in this case are stated in the opinion of the court.

It was argued by *J. A. Loring*, for the libellant; and *Mackie*, for the respondent.

WARE, J. — This is a libel for freight claimed to be due

on a cargo of coal, shipped at Philadelphia in the schooner Mesrole, for Fall River. According to the bill of lading, one hundred and nineteen tons were laden, while but one hundred and ten and a fraction $\frac{105}{2246}$ were delivered, the delivery falling short nearly nine tons; the consignee refuses to pay freight for more than was delivered, and claims to charge against the freight on the one hundred and ten tons, the price of the nine tons short delivery. It is stated by Mr. Dunn, a witness examined for the respondent, that there is usually a loss of about one per cent. on hard coal, like this cargo, by the degradation and waste of the coal in loading and unloading. But making this allowance, there will still remain a deficiency of about seven and a half tons.

It was not questioned at the hearing but that all the coal that was actually laden at Philadelphia was delivered at Fall River; and the difference between the two accounts of the lading and the delivery, can only be explained by an error in the one account or the other; either there must have been an overcharge in the account of the lading, or an error the other way in the amount of the delivery.

To prove the correctness of the bill of lading, the master has taken the depositions of two witnesses at Philadelphia, Myers, the superintendent of the wharf where the coal was taken into the vessel, and Kennedy, the weigh-master, who weighed it and kept the tally. The coal was brought to the scales in barrows, where it was weighed, and thus transported to the vessel in the barrows. Each barrow contained two hundred and twenty-four pounds when it was passed into the vessel. Kennedy noted each one as it was weighed in his tallying. This was kept in a book used for that purpose, and a copy of it is annexed to his deposition. The number of barrows marked gives one hundred and twenty-three and a half tons, in which there were four and a half tons of waste and screenings, and these being deducted leave one hundred and nineteen tons net. This was the only account taken. The mate was on board the whole time, and the master occasionally while the coal was taken in, which occupied the time from eleven, A. M., to four, P. M. It is ordinarily the duty of the mate to take the account of the cargo as it is received; but if he neglects to do it with the master's knowledge, the master must be held responsible for the correctness of the account by whomever it is taken, as he in the bill of lading adopts it. In this case the account was taken by the servant of the ven-

dor or consignor. If there was an error in the account to the amount indicated by the delivery, it is quite clear that it must have been intentional and fraudulent. It could not have been accidental.

The cargo was delivered at Fall River from the vessel into carts. It was suggested that there was a loss of coal in swinging the bucket from the vessel to the carts, by the dropping of coal into the dock. But the loss in this way could have been but a trifle. The carts when loaded were taken by the direction of the consignee to Cook's scales, there weighed, the account taken, and then carried to Taylor's coal-yard. The delivery occupied one day and part of another. Taylor engaged Macomber to receive the coal in carts, and Macomber employed six other teams. The depositions of six of the seven teamsters have been taken by the respondent, and they say that all the coal taken by them was weighed at Cook's scales. One of the carters and owners being out of the country, the respondent has not been able to obtain his deposition. Mr. Dunn, the regular clerk to take the account of coal weighed at these scales, was absent at the time of the delivery of this cargo, and the account was taken by three different persons of different portions of the cargo. While the cargo was being weighed and delivered, coal was brought from the yard for consumers, and weighed at the same scales. And it may be further remarked, that there is no positive evidence that the coal taken by Lowney was weighed at these scales.

From this account of the loading and delivery, it appears to be altogether most probable that the error was in the account of the delivery. From the change of the weighers at Cook's scales, of loads from the vessel and the interming-ling of loads for delivery to consumers, an error may be easily supposed to have been made without any imputations of fraud; while if so considerable an error was made at Philadelphia, it must have been fraudulent. A court is more ready to suppose a mistake than fraud, and if the decision is to be by the balance of probabilities, it must be in favor of the master.

But there are other considerations that belong to the case. The master is bound to see not only to the receiving personally or by his agent, but also to the proper delivery; he must at his peril deliver it to the consignee named in the bill of lading. But the consignee has also a duty to perform. When he is notified, he must seasonably be on the wharf to receive his goods. Mr. Taylor came there in the

morning after the vessel arrived, and sent his teams. The delivery to the teamsters was a delivery to him. Lowney, as well as the others, was in his employment. And if he, as was suggested, may have carried his loads to another and not to Taylor's yard, though this is certainly not probable, the loss must fall on Taylor, for the master was discharged by a delivery to his teamster.

The principal doubt that I have felt in this case is, whether the master took all that care to see to the accuracy of the account taken, both of the lading and delivery which is required by law, and by the usage of this trade. If he did not, and the account shows a short delivery, my opinion would be that he must suffer for it, and that his claim for freight must be limited to the amount which he shows to have been delivered. The discrepancy between the two accounts and the uncertainty as to the true amount of the cargo, must be imputed to his neglect. No evidence was offered to a common usage in this respect. It may easily be believed, that much less care is required in the delivery of a cargo of coal, than of a cargo of goods in bales and boxes, the value of which is great in proportion to their volume and weight. In the absence of all proof, I shall take it for granted, that in this trade it is usual for the parties to trust to the common weighers and tally men employed at each end of the voyage. In this case, I find it stated by one of the witnesses, that the coal was carried by Taylor's order to Cook's scales to be weighed. If the custom is as I suppose it to be, no satisfactory reason occurs to my mind why one party should, more than the other, be held responsible for the accuracy of the accounts. It is not pretended but that all the coal that was laden was in fact delivered; and if there is no reason for supposing fraud, there can, I think, be but little doubt that the error was made in the account of the delivery. The master is therefore, I think, entitled to full freight, according to his bill of lading. I have little doubt that this decision meets the justice of the present case, but I do not feel quite so much confidence that it may not relax too much the obligation of the master, as to his care in seeing to the correctness of the accounts of the lading and discharge of his vessel. This obligation may be more or less stringent, according to the nature of the cargo; and it may be more or less affected by the customs of a particular trade. There is no other evidence as to the custom of this trade before me, than what results from the general testimony in the case, and I

infer that the coal was received and discharged, and the account taken in the usual manner.

A question was raised on the testimony of Mr. Dunn, who states in substance that, when coal of this kind is accurately weighed, there will be a loss in the delivery of about one per cent.; on this cargo a loss of one and one-fifth of a ton. If the question fairly arises in this case, it is argued that freight is due only on the amount delivered, and assuming the account of the lading to be correct, that freight should be allowed on one per cent. less. I think otherwise. It has been a question, when goods from natural causes have become deteriorated in the course of the voyage so as to be worthless, whether the consignee may not abandon them for the freight. And it has been held by authors of high authority in maritime law, that he may. But the better opinion, I think, and that supported by the better reasons, is, that he cannot, and that in such a case the master is entitled to full freight on all that is laden. The loss is not attributable to his fault, but to the intrinsic vice of the goods, and by the principles of natural law, the loss falls on the owner. *Res perit domino.* And this decision is conformable to the principles of the contract of hiring. The engagement of the carrier is to transport and deliver the goods. This is the whole of his obligation, and this he has performed so far as depends on him, whether the merchandise is in good condition, or is degraded and deteriorated from natural causes, over which he has no control, and for which he is not responsible. For a like reason in this case, the master is entitled to freight on the whole quantity laden, if it has not been diminished by his fault.

I allow freight for the whole amount borne on the bill of lading, according to the terms of the contract. A claim is made in the libel for three days' demurrage, occasioned by this controversy about the freight. This claim strikes me as a novelty; but however that may be, I think it ought not to be allowed in this case.

Supreme Judicial Court of Massachusetts.

March Term, 1856. Suffolk.

[In view of the time necessarily taken by the official reporters in preparing and publishing the decisions, even where (as is certainly now the case in Massachusetts) the utmost despatch and fidelity are employed, the

editor has thought it would be useful and acceptable to the profession, to present in this journal abstracts of the points decided at each law term, as soon as possible after the adjournment.

We accordingly give below notes of cases decided at the March Term of our Supreme Court. In preparing them, the editor has received valuable assistance from the accomplished reporter of the State, and also in some instances from the gentlemen whose cases are reported.

In a few cases decided at this term, no opinion was delivered, but the result only announced in general terms. It has not been possible to ascertain with certainty, in all these cases, the precise grounds on which the judgment is placed where several points were raised and argued. In these, we have preferred to wait for the written opinion. Many cases have been omitted which seemed to turn on questions of fact, or to reaffirm unquestionable decisions of the court. We have endeavored, however, to err rather on the side of publishing too much, than of suppressing anything which might be of use.

We have put all the cases into this number of the journal at the expense of considerable space, because it seemed to us that it would add much to the convenience of reference.

We shall publish similar notes of the fall circuit in our state, of the decisions of several of the other states of the Union, and of English cases interesting here. The full reports will in general be of cases not likely to be reported elsewhere, or not easily accessible to our readers.]

Mulry *v.* Mohawk Valley Ins. Co.

Practice Act of 1852, *c.* 312 — *All matters of Avoidance must be alleged in the Answer.*

By the practice act (1852, c. 312), the rules of pleading and the mode of making up issues of fact, are essentially changed, in this respect, that defendant cannot, by denying plaintiff's allegations, put in issue anything more than the facts necessary to plaintiff's case.

By the old form of proceeding defendant might, under the general issue, give in evidence any facts which tended to show that the alleged contract was void *ab initio*, but now there is no general form of denying plaintiff's right to recover, and any matter of avoidance, although it extend to show he never had any cause of action, must be averred specifically in the answer.

Thus, where to an action on a policy of insurance upon goods in plaintiff's store, the defence was, that the conditions annexed to the policy had not been complied with, by disclosing that spirituous liquors (which were classed as hazardous) were kept for sale on the premises, and the fact that liquors were so kept at the time the policy was issued, came out on cross-examination of plaintiff's witnesses. It was held that defendant could not take advantage of this

defence, because his answer did not set it up, but only contained a general denial of plaintiff's allegations, and of the validity of the policy.

BANK OF BRITISH NORTH AMERICA *v.* HOOPER AND OTHERS.

Principal and Agent — Bill of Exchange.

A negotiable note or bill of exchange, signed by an agent in his own name, does not bind the principal, though made for his benefit.

A., by authority from B., drew bills in his own name, containing a direction to the drawee "to charge the same to account of B.," and payable to C., who indorsed them, and, in consideration of a commission paid him by B., negotiated them and transmitted the proceeds to A., who applied the same to B.'s use. *Held*, that a bank, which discounted the bills, could not sue B., or prove against his estate in insolvency, either on the drafts or for money loaned.

LYON *v.* WILLIAMS.

Principal and Agent — Signature to bind Principal.

On a written receipt for goods, delivered at a railroad station in Boston, "which" (by the terms of the receipt) "the several railroad companies between Boston and Zanesville, agree to transport over their lines, *via* Albany, Buffalo, Cleveland and Columbus, on the terms and conditions mentioned in their respective published tariffs, which are hereby made part of this contract, each delivering to the next connecting road, but assuming no responsibility or control of property beyond its own line, other than prompt delivery to the next succeeding line," and signed "G. Williams, jr., for the corporations," Williams cannot be charged for a loss of the goods between Boston and Zanesville.

EASTERN RAILROAD CORPORATION *v.* BENEDICT.

Principal and Agent — Parties to Actions.

On a written order, made for the benefit of the Eastern Railroad Corporation, to deliver property to "Mr. D. A. Neale, President of the Eastern Railroad Company," and

accepted by the person on whom it is drawn, the corporation may sue in their own names.

Vose *v.* Morton.

Bill of Lading — Primage and Average Accustomed.

Under a bill of lading on certain iron rails shipped from Glasgow to New York, at a certain freight per ton, "with primage and average accustomed." *Held*, that *accustomed* qualified *primage* as well as *average*, and that evidence was admissible to show a universal and well understood custom of the trade to pay no primage.

Baker *v.* Huckins.

Charter — Liability of General Owners.

General owners of a vessel let her to the master for the season for freighting and fishing, and gave him the entire management and control, but agreed to keep the vessel in repair, and to receive a proportion of her earnings as compensation. *Held*, they were not liable for stores furnished for the vessel upon the order of the master.

Shepherd *v.* Naylor.

Bill of Lading — Weight Unknown.

Bill of lading for a specified number of tons of iron, "weight unknown," binds the ship owners (in the absence of fraud) to deliver only so much as they actually receive on board.

Catskill Bank *v.* Hooper and others.

Insolvent Laws — Proof against Resident Partner of a Foreign House — Foreign Judgment.

A debt due from a partnership established in another state, cannot be proved under the insolvent laws of this commonwealth, against the estate of one of the partners who resides here, in competition with his separate creditors.

A creditor, who recovers judgment in New York against two persons as partners doing business there, one of whom resides in this state, which judgment is *primâ facie* evidence,

by the statutes of New York, against such absent defendant, cannot afterwards prove on the original consideration against the estate of such absent defendant, in competition with his separate creditors, in proceedings commenced under the insolvent laws of this commonwealth before the suit was brought in New York; and it is immaterial, in this respect, whether the two defendants were actually partners or not, the creditor having treated them as such by taking judgment against both of them in New York.

Kimball *v.* Rowland.

Landlord and Tenant — Notice to Quit — Subsequent Receipt of Rent due before.

A demand of payment of rent due on a lease at will is not necessary, in order to entitle the landlord to give the tenant fourteen days' notice to quit.

The landlord's right to commence, on the expiration of a notice to quit for non-payment of rent, the process given by the Revised Statutes, c. 104, to recover possession of the premises leased at will, is not barred by payment of said rent on the day after the giving of such notice.

Shumway *v.* Collins.

Landlord and Tenant — Eviction — Use and Occupation.

Eviction of a tenant by his landlord from part of the premises demised by a written lease, is a bar to any claim for rent under the lease.

If the tenant, after such eviction, continue to occupy the residue of the premises, he will be liable for use and occupation of the part so occupied.

The omission to pay for such use and occupation, does not render the tenant liable to the process given by Revised Statutes, c. 104, in the case of a neglect or refusal to pay rent.

Badger *v.* Holmes.

Tenant in Common — Use and Occupation.

One tenant in common cannot maintain an action for use and occupation against the lessee of his co-tenant, the

plaintiff not having objected to the occupancy, nor claimed the right to occupy himself, and the tenant not having attorned to him.

ATLANTIC MUTUAL FIRE INSURANCE COMPANY *v.* CONCKLIN.

Insurance by Foreign Companies — Returns to Secretary of Commonwealth.

Revised Statutes, c. 37, § 41, requiring agents of insurance companies to make return to the secretary of the commonwealth of the amount of their capital and how invested, &c., does not apply to mutual companies.

Nor does the provision of Statute 1847, c. 273, requiring such agents to make return of the amount of capital *or reserve*, apply to such mutual companies as are not required by law to have any reserve.

The obligation to make return every half year of the amount of insurance effected during the then last half year, does not require the first return to be made until the end of the half year after the company have actually begun to issue policies, although they may have been incorporated, and authorized to act at an earlier period.

HALE *v.* MECHANICS' MUTUAL FIRE INSURANCE COMPANY.

Insurance — Covenant against Subsequent Insurance.

Under a by-law of a mutual fire insurance company, providing that insurance subsequently obtained, without the written consent of the president, shall annul the policy; subsequent insurance, obtained by the owner of property insured, with the mere verbal assent of the president, avoids a policy obtained by him, though payable in case of loss to another person, and by such person assigned to a third.

KENNEBEC COMPANY *v.* AUGUSTA INSURANCE AND BANKING COMPANY.

Insurance — Subsequent Alteration of Contract by Parol — Power of One Joint Agent.

Defendants, a company incorporated by the laws of another state, made to plaintiffs an open policy on "prop-

erty on board vessel or vessels," &c., "as per indorsements to be made." This policy was effected through, and countersigned by defendants' agents in Boston.

Afterwards the agents agreed with plaintiffs to insure under this policy, certain cotton at and from New Orleans to Boston, and to take the risk of fire on shore at New Orleans. Some of the cotton was burnt at New Orleans without having been shipped.

After the news reached Boston, the agents made the indorsement of the risk on the policy, but added a qualification which had not been agreed upon, and would have prevented a recovery.

Held, that the general agents of defendants had authority, in absence of any proof of limitation to their powers, to alter the terms of the contract of insurance, so as to include risks to the property while on shore.

And the agents being partners, that one could make the alteration: that the alteration was duly made and evidenced, and bound the defendants to pay the loss.

Fuller *v.* Russell.

Mortgage — Foreclosure and Redemption.

Under Rev. Stat. c. 107, § 13, the mortgagor may redeem, by bringing his bill on the anniversary of the day on which, three years before, the mortgagee entered to foreclose.

Palmer *v.* Fowley.

Mortgage — Foreclosure of Second Mortgage while First Mortgagee is in Possession.

A person holding a second mortgage may enter upon the land for breach of condition and foreclose, although the holder of the first mortgage is in possession for the like purpose.

Gilbert *v.* Thompson.

Chattel — Conditional Sale of.

One who buys a chattel and takes a delivery thereof, on condition that the title shall not vest in him until payment

made, cannot, before the condition is performed, make a good title to the chattel, even to a *bonâ fide* purchaser without notice.

Young *v.* Miller.

Mortgage — Indorsee of Note no interest, at law, in Mortgage.

The indorsee of a note, secured by mortgage, cannot maintain a writ of entry in his own name to foreclose the mortgage, it not having been assigned to him.

Molineux *v.* Coburn.

Delivery of Mortgage.

Proof of the execution of a mortgage of personal property by the mortgagor, and its delivery by him to a third person to be recorded, together with its subsequent possession by the mortgagee, is sufficient to warrant the jury in finding a due delivery.

Taylor *v.* Cheever.

Case of Cleverly v. *Brackett considered.*

The case of *Cleverly* v. *Brackett*, 8 Mass. 150, is probably misreported. The doctrine said to have been decided in that case, that one holding a pledge, cannot sue for his debt without giving up the pledge, is not law.

Veazie *v.* Willis.

Guaranty — Whether applicable to Forged Note.

Plaintiff was requested to buy a note purporting to be made by A. payable to B. and by him indorsed, and indorsed by C. and D. Before making the purchase he showed the note to defendant, who inquired about it of C., and for a valuable consideration agreed in writing to "guaranty the payment of a note, &c.," describing it as a genuine note.

The signatures of A. and B. were forgeries, but this fact was not known to either party.

Held, the guaranty applied to the forged note, and that defendant was liable.

Sparhawk *v* Wills.

Contract — Whether Divisible.

A note was given by plaintiffs to defendant for $4000, payable in one year, "with interest payable annually," and secured by mortgage.

After the expiration of the year a suit was brought for one year's interest, judgment obtained and satisfied. On a bill to redeem, it was held that the judgment for interest was no merger of the principal debt.

Pembroke Iron Co. *v.* Parsons.

Sale of a "Cargo" of Goods, not qualified by Estimate of Quantity.

Defendant agreed to sell plaintiffs "a cargo of old railroad iron to be shipped per bark Charles William," at a certain price per ton, delivered at Boston, — "damages of the seas excepted — about three hundred or three hundred and fifty tons." The iron was at Savannah, and the C. W. was a vessel employed in the coasting trade between Savannah and Boston. Defendant delivered only two hundred and twenty-seven tons, and that was all the C. W. could fairly carry between these ports at that season of the year.

Held, plaintiffs could not recover for the difference between two hundred and twenty-seven tons and three hundred tons, that the agreement was for a cargo, and not for any specific number of tons.

Note. — We have no doubt of the correctness of this decision, but it may interest our readers to compare it with a recent one in England upon a contract which at first view appears very similar in its terms with that contained above. In *Bourne* v. *Seymour*, decided in the Common Pleas in England, May, 1855, 32 Eng Law & Eq. R. 455, the contract was one of sale; the bought and sold note read thus: — "Bought for Messrs. B. & Co. from S. about 500 tons of nitrate of soda in bags, of good merchantable quality, to be ready for delivery before 31 Dec. 1854, at &c.," (stating the terms with minuteness.) "It is understood that the above nitrate of soda is to form the full and complete cargo of The John Phillips, 345 tons register, now on her passage to Sidney, to proceed thence, without undue delay, to the west coast of South America, there to load the above. In the unexpected event of The John Phillips getting ashore, or being unable to prosecute her voyage from any casualties of the sea, then the seller agrees to deliver, and the buyers agree to take, in

lieu thereof, another cargo or cargoes of equal quality, to be named at the earliest practicable period prior to arrival off the coast; the nitrate of soda so substituted being liable to all the conditions of this contract. The only ground on which the seller is to be excused the delivery of the above nitrate of soda, is the loss of the vessel, (or that which may be substituted for it,) on her homeward voyage, in which case this contract is to be considered void, but in no other event whatever."

The John Phillips performed her voyage. It was held that this was a contract for the sale of five hundred tons, more or less, and was not limited to the amount that the J. P. would carry.

Johnson *v.* Rayner.

Grant — Deed — Words to pass the Soil.

In a real action, the tenant pleaded the general issue, and also as to a part of the premises, non-tenure and disclaimer; and the only issue tried was as to this portion.

Held, that a verdict that the tenant did not extend his building over the land of the defendant, was a proper finding in favor of the tenant upon this issue.

S. made a deed to C., granting also "a well of water, with the curves, pumps and all utensils belonging to them, as the same now stands on other land of me, the said S., and a right at all times to pass and repass to and from the said well of water, through my said other land, and to set up shears or any other machine on my said land for the purpose of reparing said well of water and the pumps therein, whenever the said C. may think proper so to do; reserving to myself and my heirs and assigns the free and uninterrupted privilege of the hand-pump, in the aforesaid well, and of the said well and water." *Held*, that this was a grant of the soil occupied by the well and necessary to its enjoyment, and a reservation to the grantor of an easement therein.

Clark *v.* Scudder.

Action, Local — Covenant.

On a covenant for quiet possession in a deed of land, no action lies by one who holds only by privity of estate of the covenantor, except in the county where the land lies, although it is out of the commonwealth, and both parties reside here.

Boyd *v.* Frieze.

Bill of Exchange — Consideration for Forbearance.

Forbearance to sue the drawer of a bill, on receiving the bill of a third person as security for the first bill, is evidence from which a jury may infer an agreement to forbear to sue the original drawer, and so may constitute a sufficient consideration for the second bill.

Small *v.* Sumner.

Receipt, Construction of.

A receipt for the "amount of net proceeds" of chattels of a perishable nature, attached and sold by assignment under Rev. Sts. c. 90, §§ 58–61, given by the authorized attorney of the debtor, on a settlement with the creditor, is conclusive, in the absence of fraud or mistake, against a claim of the debtor for an additional sum.

Brown *v.* Fogg.

Poor Debtor, Examination of.

A creditor was notified to attend at a certain hour an examination of the debtor upon his application to take the poor debtor's oath, and went to the place appointed within the hour. The justices had already administered the oath and discharged the debtor. *Held*, the discharge was invalid.

Mitchell and Another *v.* Dyer and Another.

Insolvent Law — Property.

B. indorsed notes of A. to enable A. to purchase coal and wood, the parties agreeing that the coal and wood purchased would be transferred to B. as security for said indorsements, to be assigned by B. to A. for sale; and A. accordingly executed to B. assignments of the bills of lading of the coal, and, after the discharge of the coal, bills of sale thereof; and procured the vendors of the wood to execute bills of sale thereof to B.; and B. from time to time conveyed all the coal and wood to A. for sale, and never had, or took, or demanded possession of any part thereof, but suffered A. to sell the same in his usual course

of business, as if he had been the absolute owner thereof, until within a month of his petitioning for the benefit of the insolvent laws, when both parties, knowing that A. was insolvent, B. took possession of the coal and wood remaining unsold.

Held, that B. was entitled to hold it as against A.'s assignee in insolvency.

Lewis *v.* Bolitho.

Probate — Who may Appeal.

One who claims a chattel as a *donatio causâ mortis*, is not bound by a decree of the judge of probate, ordering distribution of said chattel with other property of the deceased, and cannot therefore appeal from the decree.

Munroe *v.* Merrill.

Officer, Return of, on Writ of Execution.

An officer who arrests a debtor on execution, and afterwards discharges him upon his showing a writ of protection, cannot, in an action for false imprisonment, justify under the execution, unless his return thereon show that the arrest was made.

McFadden *v.* Burns.

Conflict of Laws — Usury in another State — Penalty.

By the law of Missouri, six per cent. is the lawful rate of interest, and in a suit on a promise by which more than that rate is recovered, the plaintiff recovers the lawful amount to his own use, and the unlawful interest to the use of the county schools.

Held, that in an action on such a contract brought in this commonwealth, the plaintiff could recover six per cent. interest and no more.

Field *v.* Crawford and Trustees.

Securities, Application of — Trustee Process — Mortgage.

A. mortgaged land to B. to secure payment of six thousand dollars. A. afterwards sold the land to C. who assigned to B. the policies of insurance on the buildings standing upon the mortgaged land, "as collateral security for A.'s note, the surplus of said policies to be paid to D. or his assigns."

The condition of the mortgage having been broken, B. entered to foreclose; when the three years had nearly elapsed the buildings were burned; B. demanded payment of the loss from the insurance companies, who at first refused to pay. The three years elapsed and the land was not redeemed, and subsequently the companies paid the loss.

The money received from the insurance companies was nearly as large as the amount of the whole mortgage debt. The value of the land, at the time of foreclosure, together with the amount received for the loss by fire, considerably exceeded the mortgage debt due at that time.

After some time, a creditor of D. sued him, and summoned B. as trustee. It appeared in evidence that B. had, just before the expiration of the three years, agreed with a subsequent mortgagee to collect the money from the companies and apply it towards the debt, and allow the second mortgagee a few months further time for redemption. The second mortgagee, however, did not redeem.

Held, B. was not chargeable as trustee of D.

Dorr *v.* Boston.

Tax — Cestui que trust residing here, Trustee in another State.

Feme cestui que trust, residing in this state, was the beneficial owner of certain shares in foreign corporate companies, and was entitled to receive the income and dividends thereof; but the legal title to the shares was in the trustee who resided in another state.

Held, the *cestui que trust* was not taxable in this state upon the shares, nor upon the income derived therefrom.

Pingree *v.* Coffin.

Equity — Examination of nominal Parties — Jurisdiction — Contracts, by whom avoidable for illegality — Mortgage.

A defendant to a bill in equity, who has an interest in the result, may be examined as a witness for the plaintiff by order of the court.

A resident of another state, who is a necessary party to a bill in equity, brought here for the specific performance of a contract to convey land in that state, cannot, after being served with summons here, and filing an answer to the bill, object that the court have not acquired jurisdiction of his person.

A land agent of the Commonwealth, who has purchased from the obligee and agreed to convey to another a bond from the commonwealth, which he had executed as land agent, cannot object to a bill for the specific performance of his agreement, that his purchase of the land was void as against public policy, no objection having been made by the commonwealth, who had received the entire consideration of the original bond.

V., the obligee of a bond from the commonwealth for the conveyance of land in Maine, agreed to sell his interest in the land to S., and took therefor the note of S., which he indorsed and loaned to S. for his accommodation, and S. procured to be discounted by C.; and V., at S.'s request, made the assignment to C., "subject to the payment of the note, if the aforesaid note is not paid at maturity, this assignment to be null and void." *Held*, a mortgage to secure payment of the note, and also a conveyance of the equity of redemption in trust for S. S. afterwards took up the note, made a settlement with C., paid him some money, and gave him a new note; and C. agreed to assign the bond to S., provided S. paid his note at maturity. *Held*, that this agreement was also a mortgage, that time was not of its essence, and there having been no foreclosure, that a bill might be maintained, after dishonor of the note, for an account and conveyance.

Hancock *v.* Carlton.

Condition — Forfeiture for non-payment of Money — Jurisdiction in Equity — Laches — Waiver.

A. sold and conveyed a lot of land to B., *upon condition* that B., his heirs and assigns should pay certain mortgages on the land, and save A. harmless therefrom.

B. afterwards mortgaged the land back to A., to secure a sum less than the consideration named in the deed. One of the mortgages referred to in the condition was not paid by B. or his assigns, and A. was obliged to pay it. He then entered for breach of the condition.

On a bill to redeem, brought against A. by C., holder of a subsequent mortgage made by B., A. pleaded the condition, forfeiture and entry.

Held, that A.'s act in taking a mortgage back from B. had not defeated the condition of his deed, the mortgage never having been foreclosed.

That the court had jurisdiction in equity of this bill as a bill to redeem, and might incidentally determine the question of relief against forfeiture, though it might not have jurisdiction to relieve against a forfeiture simply.

That equity will relieve against a forfeiture incurred by non-payment of money, in case of fraud, accident, mistake or surprise; and ordered the case to stand for a hearing, saving to the defendant the benefit of his plea.

Upon the hearing it appeared that the plaintiff had received due notice to pay the debt, and had been guilty of laches.

It also appeared that the defendant, before his entry, assigned his mortgage from B. to a third person, upon whom he entered, and after his entry took a re-assignment of the same mortgage; that he sold and conveyed the land to a purchaser, to whom he made a deed of assignment of the mortgage, the note and debt thereby secured, "so far as the same is unsatisfied and owing," and of all his right, title and interest in the mortgaged premises, excluding warranty, and in the covenants of the mortgage deed, to hold "without merger in, or prejudice to any other title he may have, and as another and independent source and protection of title."

Held, That this was not a waiver of the defendant's rights by the forfeiture and entry, so as to set up the mortgage so assigned as a subsisting incumbrance, and thus entitle the plaintiff (who was neither party nor privy to that assignment) to redeem.

Blasdell *v.* Souther.

Contract — Construction.

An agreement in writing whereby a firm of machinists, in consideration of an individual's soliciting and procuring for them contracts for making locomotive engines and tenders, agrees to "allow and pay him a commission of two and a half per cent. on all their locomotive business, computing the same upon the total amount of sales of locomotives and tenders manufactured and sold by them during the term of five years from the date," does not bind them to pay him such a commission on locomotives and tenders, the contract for which are procured at his solicitation, the manufacture of which is commenced, but not completed nor paid for during such term.

Miscellany.

Who's who on the Bench?

We, in this journal, have always endeavored to support to the extent of our ability, the respect and regard towards the judiciary of the states and of the nation, which are the main stay of their influence and power. We have been old fashioned enough to believe and maintain that all possible safeguards to this respect and regard should be exacted and maintained. We have occasionally seen, or thought that we saw, a tendency in some quarters, and as the effect of some popular measures, to weaken these feelings; and such measures and tendencies we have uniformly opposed.

The late proceedings in the Supreme Court of the City of New York, (a court of large powers, and of the highest original jurisdiction in the state), with reference to the disputed seat upon its bench, are not calculated, we think, to strengthen the hands of the friends of the judiciary. Were it not that the actors in this scene were persons of eminent gravity, selected by their fellow-citizens to be the interpreters and expounders of the law, and whose decisions have been and are of deserved authority and weight, we should be inclined to call the matter a farce. As it is, we will narrate the affair without that comment.

In February, 1855, Judge Edwards, whose term of office would have expired on the 31st of December last, died, and the governor immediately appointed Mr. Edward P. Cowles to fill the vacancy thus created. On the 25th of August in the same year, the secretary of state gave notice that at the ensuing election, a justice of the Supreme Court was to be elected in the place of Judge Cowles, whose term of office would expire on the 31st of December.

On the 23d of October, 1855, Judge Morris, of the same court, died, thus creating a vacancy, required by the constitution to be filled at the next election after the happening thereof. Either from want of time, or some other reason not apparent on the record, no official notice was given of an election to fill this vacancy. Each of the several parties, however, nominated a candidate, ostensibly for the seat thus vacated, and no less than four gentlemen received votes for this office. Among whom were Mr. Peabody and Mr. Davies. On the 3d of December, 1855, Judge Cowles resigned the office to which he had been appointed on the death of Judge Edwards, and Mr. Peabody was appointed to fill it. He accepted the appointment, and acted under it for the space of twenty-seven days, when his term expired, and Mr. Whiting who had been duly elected to succeed to this office, entered upon its duties. On the same 3d of December, the governor, treating the votes in the fall for a judge in the place of Judge Morris as irregular, illegal and void, for want of due notice from the proper authorities, nominated Judge Cowles for the unexpired term of Judge Morris, and on the 6th of December, Judge Cowles entered upon the duties of that office. The attorney general immediately filed a bill in the nature of an information quo warranto against Judge Cowles, and to this proceeding, Mr. Davies, who had received at the fall election a plurality of the votes given for the candidates nominated to fill Judge Morris's vacancy, was made a party plaintiff. To this bill Judge Cowles demurred, the Supreme Court in the city, composed of his associates on the bench, sustained the demurrer, and decided the election invalid. The case was removed to the Court of

Appeals, and this decision was there overruled, that court holding the election valid, and in their judgment ordering, among other things, "*that Henry E. Davies named in this complaint be, and he is hereby declared to be entitled to the said office by virtue of the election in said complaint mentioned.*" On the 4th of February, succeeding the announcement of this opinion, but before Mr. Davies had taken any action upon it, or endeavored to assume the office thus apparently secured to him, two of the judges of the Supreme Court addressed him a letter, stating that they had examined the claims of the "*contestants*" to the vacant seat; that, in their opinion, the votes given for him at the election in the fall were irregular in form and void for uncertainty, and that they considered Judge Peabody (another of the candidates not a party to the information) duly elected. To this letter Judge Davies replied. On the 14th of February, the court, consisting of three judges, among them Judge Peabody, came in at the usual hour, and almost at the same instant Judge Davies entered the court room, handed the clerk a copy of the opinion of the Court of Appeals, directing him to file it, asked an officer for a chair, and took his seat upon the bench. An hour later the court directed the clerk to make the following entry.

Ordered, That the court does not recognize any persons as judges present at this general term, except Judges Roosevelt, Clerke and Peabody, and that the clerk and other officers be directed to govern themselves accordingly.

The next morning, punctual to the moment, Judge Davies again appeared and took his seat of the previous day; a large crowd, induced by curiosity, had filled the court room. The other judges entered the room, and an officer handed Judge Peabody a chair, without either party speaking a word, or in any way recognizing the presence of the other. The sheriff opened the court, and the presiding justice immediately ordered its adjournment for a week. In a different apartment another judge was holding sittings in chambers, and upon the adjournment, Judge Davies walked directly into this room, was received by him with great cordiality, and invited to hold court; he immediately assented, took his seat, heard motions and granted orders in the exercise of his judicial discretion during the rest of the morning. This continued for some days, Judge Davies holding court at chambers, assuming to act as judge, and issuing his orders in the cases brought before him, decreeing divorces, and directing one or more arrests. The court, it is said, were divided in opinion. Some of the judges thinking that he should be recognized as judge, and others adhering to the doctrine of the letter already referred to. The officers of the court were left to act pretty much according to their discretion, and the clerk and the sheriff both finally declared for Judge Davies. The members of the bar appear to have been a little shy at first of this unrecognized judge, but their timidity was probably of short duration, for the Tribune of February 21st, announces Judge Davies as still holding court at chambers, and that *he appeared to have less time for the newspapers than on preceding days.*

On the 26th of February, two matters occurred which did not certainly disentangle this complicated knot. Judge Clerke, one of the signers of the letter, vacated an order of arrest granted by Judge Davies, on the ground that he was not *de facto* a judge of that court; and Judge Peabody presided at the examination of candidates for admission to the bar, which is required to be held in open court. Meanwhile both judges still continued to be present at the general term; the only change in the aspect of the bench, arising from the fact that the seats of the two *contestants* (to borrow the judicial phrase) were placed at each extremity of the bench, instead of side by side as on the first memorable day. It was

only at these sessions of the court at general term that the other members of the bench, the bar, and both contestants came into direct contact, and their meetings sometimes gave rise to colloquies more animated than dignified, of which the following may serve as a specimen. "Of how many judges does this general term consist? Of three or four, sir?" said one of the counsel about to open the argument of a case, addressing the presiding judge, and looking directly at the four incumbents of the judicial bench. "Of three judges only," was the reply. "Very well, then I'll address my argument to the three judges whom I think constitute the court," was the instant rejoinder.

But now a new arbiter appears. Judge Strong, of the second judicial district, who was for some cause holding court in New York, invites Judge Davies to take his place in that district, and thus on the 10th of March, at Brooklyn, Judge Davies for the first time, without fear of interruption and with no one to question his authority, donned the judicial costume. For this day, at least, he was every inch a judge.

The contest which has already lasted more than a month, now draws to a close. On the 17th of March, Mr. Peabody wrote to the two judges who signed the letter before mentioned, and declined, under all the circumstances, and probably in accordance with their advice, acting any longer as judge; proposing, as Mr. Davies would not consent to put himself again in the attitude of plaintiff, and permit him to hold the seat till the controversy was decided, and as Judge Cowles would not, or could not, by an understanding with Mr. Davies, take advantage of the opportunity allowed him by the Court of Appeals, to file an answer to the original suit, to become himself the prosecutor in a suit against Mr. Davies, to test his right to the seat of which he had held for a month a *quasi* occupation, and which by Judge Peabody's withdrawal he would, with the consent of all parties, occupy as a judge *de facto*.

His letter treated with considerable severity the conduct of all the parties to the dispute, both principals and accessories; and commented upon the course of Judge Cowles in such a way as to call forth from him a very sharp reply, justifying himself, and handling without gloves (to borrow a phrase from the noble art) the other combatants. This was the last act of the solemn comedy.

Judge Davies now occupies the seat of justice, and is for a time, at least, the acknowledged dispenser and expounder of the law. It is, we believe, the first instance of an application of what may be called the doctrine of squatter sovereignty to the judicial office. We trust it may be the last. We ask our citizens to respect the judiciary; but they must be very careful to respect themselves. And can they be said to have done so, in this instance?

They permitted a man whom they had decided and publicly declared to be no judge, to occupy the seat, and perform the functions of a judge, to issue his commands and enforce their execution by the officers of the court for more than a month, without let or hindrance from any judge of the court, except the entry on the clerk's book, and the single act of Judge Clerke already mentioned.

If John Smith or Patrick Killigan, (to put the pertinent question of a New York paper,) were once to do what Mr. Davies did for weeks, would it be endured for a moment? Clearly not, and yet if the judgment of the court, entered upon its own records, is of any force, Mr. Davies had no more authority for his course than any other citizen of the state. If the original conclusion of the court was erroneous, and the judges upon further investigation had come to a different decision, it was clearly their duty to announce this change of opinion, and to refuse

longer to recognize Mr. Peabody as their associate upon the bench, or to permit him to discharge the duties of a judge.

We fear that this must be set down as another instance of the danger of introducing the distracting element of politics into judicial discussions.

It may also strengthen somewhat the arguments of those who, like ourselves, and, we are happy to believe, most of our neighbors, maintain that the best and safest tenure for judges is the old one of good behavior.

Notices of New Publications.

THE LAW OF LANDLORD AND TENANT. Being a course of lectures delivered at the Law Institute, by JOHN WILLIAM SMITH, late of the Inner Temple, barrister at law. With notes and additions by FREDERIC PHILIP MAUDE, of the Inner Temple, barrister at law. With notes and references to the American cases, by PHINEAS PEMBERTON MORRIS. Philadelphia: T. & J. W. Johnson. 1856.

The late Mr. Smith was admirably fitted for a commentator and lecturer upon legal subjects. He possessed a rare combination of powers which enabled him to be at once condensed and clear, comprehensive and eminently practical.

This new book, edited from notes of lectures delivered by Mr. Smith, possesses the substantial qualities which rendered his treatises deservedly famous, although it is perhaps a little less perfect in form than if the author had himself prepared it for the press. As a text book for students it is the best modern work we have seen, and deserves to be read as a sequel to the admirable title on Leases and Terms for Years, in Bacon's Abridgment, as bringing the subject down with equal clearness and precision, though with less fulness of learning, to the present time.

The notes, both English and American, are carefully prepared and useful, though perhaps a little too full. Still, however, the book is within a very reasonable compass. A single fault of the American edition we feel bound as purists to notice, and that is, that in citing the standard English reports, the editor invariably adds the book and page of the Philadelphia edition, thus: — "Davis *v.* Eyton, 7 Bing. 154, (20 E. C. L. R. 77.") This mode of citation may be useful in recent cases, because the American collections have of late got control of the market, but we fancy that it will be of very little assistance to any member of the profession, wherever situated or however uninstructed, to add an explanation to a citation of Taunton, Bingham, or Adolphus & Ellis. This, however, is a trifle to the great substantial merits of the book, which withal is very well edited, as we have said. It is also excellently printed and bound, and is altogether a valuable addition to our legal literature.

A TREATISE ON THE LAW OF BILLS OF EXCHANGE, Promissory Notes, Bank Notes, Bankers Cash-notes, and Checks. By JOHN BARNARD BYLES. Fourth American from the sixth London edition. With additional notes illustrating the law practice in this country. By HON. GEORGE SHARSWOOD. Philadelphia: T. & J. W. Johnson. 1856.

Of Mr. Byles's book, as illustrated by the learned American editor, since it has gone through six editions in England and four in this country, it

cannot be necessary for us to say much, except that the new edition brings this standard work down to the present time. Written originally as a "plain and brief summary of the principal practical points relating to bills and notes," it has grown to be a treatise of more than five hundred pages, exclusive of Appendix. It has not yet, however, outgrown its usefulness, but remains the standard practical summary and book of reference for every-day use upon the subject.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Adams, George	Hingham,	Mar. 20, 1856,	Perez Simmons.
Allen, Lewis E.	Charlestown,	" 8,	Isaac Ames.
Almy, John E. (*a*)	New Bedford,	Feb. 18,	Joshua C. Stone.
Ashby, John J.	Salem,	March 24,	John G. King.
Axtell, Francis H.	Huntington,	" 29,	H. H. Chilson.
Bacon, Clark	Somerville,	" 19,	John M. Williams.
Bassett, Joel L	Easthampton,	" 10,	H. H. Chilson.
Bettis & Palfray, (*b*)	Salem,	" 4,	John G. King.
Blake, James M.	Boston,	" 7,	Isaac Ames
Bradley, William	Charlestown,	Jan. 22,	Josiah Rutter.
Chandler, John G. (*c*)	Roxbury,	March 26, }	Charles Endicott.
Chandler, Samuel W. (*c*)	Boston,	" 26, }	
Childs, George H.	Charlestown,	" 27,	John W. Bacon.
Childs, Joseph P.	Greenfield,	" 21,	H. G. Newcomb.
Clapp, William F. H.	New Bedford,	Feb. 5,	Joshua C. Stone.
Collingill, John	Haverhill,	March 8,	Thomas A Parsons.
Drake, Augustin J. (*d*)	Boston,	" 19,	Isaac Ames.
Fenby, Thomas P.	Lynn,	" 14,	John G. King.
Ferren, Amos C.	Lawrence,	" 3,	Thomas A. Parsons
Fletcher, Edmund	Haverhill,	" 27,	John G. King.
Folsom, S. S. W.	Malden,	" 3,	John W. Bacon.
Freeman, James W.	Holden,	" 28,	Alexander H. Bullock.
Goodrich, Elijah D. (*e*)		" 29,	John M. Williams.
Goodrich, H. M. (*e*)		" 29,	John M. Williams.
Goodridge, Samuel	Manchester,	" 15,	John G. King.
Green, Joseph	Leyden,	Dec. 20, 1855.	H. G. Newcomb.
Hanson, Erastus G.	New Salem,	Feb 12, 1856,	H. G Newcomb.
Harrington, George A. (*f*)	Paxton,	March 6,	Alexander H. Bullock.
Hart, Jason	Plymouth,	" 26,	John J. Russell.
Hastings, Charles (*g*)	Cambridge,	" 22,	John W. Bacon.
Hawkes, Ezra, jr. (*h*)	Chelsea,	" 15,	Isaac Ames
Hayes, Daniel	Natick,	" 17,	John W. Bacon.
Holt, Samuel (*g*)	Cambridge,	" 22,	John W. Bacon.
Holton, John	Boston,	" 18,	Isaac Ames.
Howard, Henry	Salem,	" 13,	John G. King.
Howe, Hollis H. (*f*)	Paxton,	" 6,	Alexander H. Bullock.
Hooper, John P.	Lynn,	" 31,	John G. King.
Jaquetto, Charles W.	Adams,	" 31,	J. N. Dunham.
Johnson, Charles H. (*i*)	Boston,	" 24,	Isaac Ames.
Jones, William R.	Danvers,	" 6,	John G. King.
Kelsey, John B. (*h*)	Boston,	" 15,	Isaac Ames.
Kilbourn, Josiah B.	Boston,	" 17,	Isaac Ames.
Kimball, Isaiah W.	Charlestown,	" 28,	John W. Bacon.
Lawrence, Edwin	Salem,	" 6,	John G. King.
Lewis, Seth W.	Charlestown,	" 11,	John W. Bacon.
Loveland, H. N. (*e*)		" 29,	John M. Williams.
Manning D. W. (*j*)	Lowell,	" 15,	L. J. Fletcher.
Manning, John (*j*)	Lowell,	" 15,	L. J. Fletcher.
Naylor, George	Lawrence,	" 29,	J. M. Williams.
Newcomb, Samuel N.	Lynnfield,	" 7,	John G. King.
Osbourn, Leander	East Bridgewater,	April 1,	Perez Simmons.

Peaslee, Joseph (*d*)	Boston,	Mar. 19, 1856.	Isaac Ames.
Penniman, Adna L.	Chelsea,	" 26,	John M. Williams.
Putnam, Alfred M.	Danvers,	" 20,	John G. King.
Raddin, Nelson	Lynn,	" 1,	John G King.
Reynolds, Moses C. (*k*)	Salem,	" 25,	John G King.
Richmond & Almy, (*a*)	New Bedford,	Feb. 18,	Joshua C. Stone.
Richmond, Anthony D. jr. (*a*)	New Bedford,	" 18,	Joshua C. Stone.
Sanford, Calvin	Barre,	March 4,	Alexander H. Bullock.
Sanger, George F. (*k*)	Salem,	" 25,	John G. King.
Seavey, Eben. (*e*)		" 29,	John M. Williams.
Sibley, Moses H.	Salem,	" 14,	John G King.
Sloan, Joseph W.	Dorchester,	" 26,	Charles Endicott.
Smith, Henry	Dedham,	" 4,	Charles Endicott.
Smith, Joseph B.	Newton,	Feb. 18,	Josiah Rutter.
Southwick, Erastus S.	Shutesbury,	Mar. 25,	H. G. Newcomb.
Spring, Luther 2d.	Worcester,	" 14,	Alexander H. Bullock.
Tenny, Daniel	Sutton,	" 4,	Alexander H. Bullock.
Thayer, Ebenezer T. E.	Braintree,	" 14,	William L. Walker.
Townsend, Joseph A.	Lynnfield,	" 26,	John G. King.
Turner, James	Haverhill,	" 12,	Thomas A. Parsons.
Twichell, Daniel	Northfield,	" 4,	H. G. Newcomb.
Wait, James H.	Orange,	" 4,	H. G. Newcomb.
Wason, Robert	Charlestown,	" 8,	John W. Bacon.
White, Charles H.	Charlestown,	" 27,	John W. Bacon.
White, Joseph	Adams,	" 28,	J. N. Dunham.
Whitman, James W.	Charlemont,	" 15,	H. G. Newcomb.
Wilkins, Frederick A. (*i*)	Chelsea,	" 24,	Isaac Ames.
Youngman, David	Winchester,	" 15,	John W. Bacon.

(*a*) Richmond & Almy, "as copartners and individually."

(*b*) Bettis & Palfray, Salem. "Proceedings suspended."

(*c*) S W. Chandler and Brother. "Business in Boston."

(*d*) Peaslee & Drake.

(*e*) Goodrich, Seavey & Co. "Business in Boston."

(*f*) Howe & Harrington.

(*g*) Holt & Hastings.

(*h*) Kelsey & Hawkes.

(*i*) Johnson & Wilkins.

(*j*) D. W. Manning & Co. "Jointly and severally."

(*k*) Sanger & Reynolds.

*** The name of **Zenas Hawkes**, published in the April number, should have been rendered ***Amos*** Hawkes.